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See Vol. 3166

Vol 3167

No. 16322

United States
Court of Appeals
For the Ninth Circuit

S. A. PETERS and TIMBER, INC., of CALI-
FORIA,

Appellants.

VS.

KAL W. LINE, Trustee in Bankruptcy of the
Estate of Snow Camp Logging Co., Bankrupt,

Appellee.

Transcript of Record

In Two Volumes

FILED

Volume I

MAY - 5 1959

(Pages 1 to 270) PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

No. 16322

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Court of Appeals
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In Two Volumes**

**Volume I
(Pages 1 to 270)**

**Appeal from the United States District Court for the
Northern District of California,
Northern Division.**

No. 16322

Charles Foster
County of Sparks
vs
The State of Nevada

WILLIAM A. PETERSON, ATTORNEY FOR PLAINTIFF,
vs
JOHN A. PETERSON, ATTORNEY FOR DEFENDANT.

WILLIAM A. PETERSON, ATTORNEY FOR PLAINTIFF,
vs
JOHN A. PETERSON, ATTORNEY FOR DEFENDANT.

Consent of Parties
In Two Volumes

Volume II
(Pages 271 to 283)

Approved from the United States District Court for the
Northern District of Nevada
Wm. A. Peterson

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NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Appellants S. A. Peters and Timbers,
Inc., of Calif., a Corp.:

L. W. WRIXON,
CHARLES M. STARK,
PAUL W. McCOMISH,
HUBER & GOODWIN,
Mills Tower,
San Francisco, Calif.

Attorney for Trustee:

MAX H. MARGOLIS,
155 Montgomery Street,
San Francisco 4, Calif.;

FREDERICK L. HILGER,
Associate Counsel,
924 Fifth Avenue,
Eureka, California.



In the Northern Division of the United States
District Court for the Northern District of
California

No. 14388

In the Matter of:

SNOW CAMP LOGGING COMPANY, a Co-
partnership, et al.,

Bankrupt.

PROOF OF CLAIM

State of California,
County of Humboldt—ss.

S. A. Peters, of the City of Arcata, County of
Humboldt, State of California, being first duly
sworn, deposes and says:

1. That he is an officer, to wit: President of
Timber Incorporated of California, a corporation,
organized and existing under the laws of the State
of California, and carrying on business at P. O. Box
871, Arcata, Humboldt County, California, and he
is authorized to make this proof of claim on its be-
half;

2. That he is also an individual making this
proof of claim on behalf of S. A. Peters, an in-
dividual.

3. That Snow Camp Logging Company, a cor-
poration, the above-named bankrupt, was at and
before the filing by it of its petition for adjudica-

tion of bankruptcy, and still is justly and truly liable to said Timber Incorporated of California, a corporation, and to S. A. Peters, an individual, in the sum of Nine Hundred Thousand Dollars (\$900,000.00.)

4. That the consideration of said liability is as follows:

Said liability arises out of a breach of a certain contract between Clarence Vander Jack and Clarence C. Vander Jack, a partnership, doing business as Snow Camp Logging Company, and S. A. Peters dated June 1, 1951, a copy of which said contract is annexed hereto, marked "Exhibit A," and by this reference made a part hereof, upon which there is presently pending in the Superior Court of the State of California, in and for the County of Humboldt Action No. 28851 and entitled Snow Camp Logging Co., a corporation, Plaintiff, vs. S. A. Peters and Timber Incorporated of California, a corporation, Defendants, a copy of which complaint is annexed hereto, marked "Exhibit B," and by this reference made a part hereof. That said S. A. Peters, an individual, and Timber Incorporated of California, a corporation, filed an answer to said complaint denying any liability, and filed a cross-complaint for damages in the sum of Nine Hundred Thousand Dollars (\$900,000.00) against the above-named bankrupt, the Plaintiff and Cross-defendant in the above-referenced action. A copy of said answer and cross-complaint are annexed hereto, marked "Ex-

hibit C” and “Exhibit D” respectively, and by this reference made a part hereof.

Reference is made to said contract, complaint, answer and cross-complaint for further particulars regarding this claim.

5. That S. A. Peters and Timber Incorporated of California, a corporation, deny any and all liability as alleged in said complaint, as seen by referring to the answer filed in said action; and allege that there are no set-offs or counter-claims to this said claim.

6. That neither said S. A. Peters, an individual, nor said Timber Incorporated of California, a corporation, holds and has not, nor has any person by his or its order, or to deponent’s knowledge or belief, for his or its use, had or received any security or securities for said liability.

7. That the action above referred to is still pending in said Superior Court of the State of California, in and for the County of Humboldt, and therefore said claim is unliquidated, and no judgment has been rendered thereon.

/s/ S. A. PETERS,

TIMBER INCORPORATED OF CALIFORNIA,
a Corporation,

By /s/ S. A. PETERS,
Its President.

Subscribed and sworn to before me this 4th day of January, 1956.

[Seal] /s/ KATHRYN CARR LARGUS,
Notary Public in and for the County of Humboldt,
State of California.

EXHIBIT A

Agreement

This indenture made and entered into this 1st day of June, 1951, by and between Clarence Vander Jack and Clarence C. Vander Jack, a partnership, dba Snow Camp Logging Company, sellers, and S. A. Peters, buyer, the former of Arcata, California, the latter of Eugene, Oregon.

Witnesseth:

That Whereas, sellers are presently engaged in a logging and log sales operation in the County of Humboldt upon the Redwood Creek Ranch and vicinity; and

Whereas buyer intends, either personally or through corporation, to operate three mills in the County of Humboldt in the Redwood Creek Ranch area, the first to be a Gang Mill, the second a Band or Circular Mill and the third a Veneer Mill; and

Whereas buyer contemplates operation of his mills for eleven months of each year and sellers contemplate operation for ten months of each year;

Now, Therefore for and in consideration of the mutual promises, covenants and conditions it is mutually agreed as follows:

1. That the effective date of this agreement is June 1, 1951, and that all relationships and agreements of the parties are covered hereby.

2. That neither party shall violate the terms of the agreement between sellers and Barnum & Steele of the 28th day of March, 1951.

3. That sellers agree to furnish and buyer agrees to purchase all the logs required by buyer in the operation of any or all of the mills in the Redwood Creek Ranch area.

4. That the price of all logs shall be Arcata price less the sum of Four Dollars (\$4.00) per thousand (1,000) feet net Spaulding log scale delivered at mill. Arcata price shall be computed by the average of five of the larger log-buying mills in the Arcata area. Buyer agrees to make payment upon the 25th day of each month for logs delivered between the 1st and 15th of that month, and upon the 10th of each month for logs delivered between the 15th and the end of the preceding calendar month. All scaling shall be performed by a Bureau scaler at the mill and the cost of this scaler shall be shared by the parties equally.

5. Gang type logs shall be anything up to 32 inches on the butt end down to 8 inch tops. Buyer agrees to accept all logs up to 40 per cent (%) defective.

6. Buyer agrees to commence construction of Gang type mill before August 1, 1951, and to complete same with reasonable diligence except as prevented by conditions beyond the control of buyer. Nonperformance of this provision shall, at option of sellers, operate as a forfeiture of this agreement.

7. The term of this agreement shall be for ten (10) years. Buyer shall have option to renew upon similar terms for an additional period of ten (10) years. Option to be exercised in writing at least thirty (30) days prior to expiration date of this agreement. Terms to be settled by agreement or arbitration. This provision to arbitrate terms shall be subject to an action for specific performance and an arbiter may be designated by Court.

8. Sellers shall have the right to sell logs of any type to other buyers of logs until buyer comes into full production upon that type of log. In the event buyer ceases production upon any type of log, or cuts back on production, sellers shall have the right to sell any of such logs as buyer does not require upon the open market and to other buyers.

9. Buyer agrees to call the attention of sellers to any timber or logs being for sale upon which buyer secures knowledge, and to grant to sellers

the first refusal upon any logs or timber purchases contemplated by buyer, within the Redwood Creek Ranch area.

10. In the event of the bankruptcy, insolvency or abandonment of that parties agreement with Barnum & Steele, the other party shall have the right and option to purchase the operation of such party upon such terms as may be agreed upon.

11. Each of the parties shall have the option to purchase the operation of the other for the period of thirty (30) days after written notice by selling party of proposed sale to any third party; terms of sale shall be the same as those offered to third party. Each party agrees to complete no sale to any third party of any major portion of his operation, including timber contracts, without first offering his operation for sale to the other party.

12. This agreement, or any part hereof, is not assignable in whole or in part. Buyer shall have the right to assign this agreement to any corporation or corporations set up by buyer for the operation of any mill, provided that such assignment shall not relieve buyer, personally, from the obligations hereof, and provided further that buyer is an owner of 51 per cent of the capital shares of such corporations.

13. Any additional timber holdings or contracts acquired by sellers in the Redwood Creek Ranch area shall come under the terms of this agreement.

14. The parties hereto are independent contractors.

15. Neither party shall permit liens, levies of attachment or execution, nor seizures to be made upon any logs covered by this agreement, and to discharge the same immediately if threatened, attempted or levied.

16. In the event of the bankruptcy or insolvency of either party, or the appointment of a receiver, this agreement and all obligations of the parties hereto, with the exception of those previously accrued, shall at the option of the other party be immediately terminated.

17. In the event of the failure of either party to perform any of the terms of this agreement at the time and in the manner specified, the other party may give written notice specifying the deficiency or default existing, and such party in default shall have the period of thirty days to cure or amend such default. In the event such default is not cured within the thirty day period, the other party shall have the option to terminate this agreement forthwith by notice in writing, and all obligations with the exception of those previously accrued shall cease immediately, and the further exception of the defaulting party to respond in damages, if any, for breach of contract.

Buyers agree to make available to sellers all information acquired by buyers concerning timber

lands or interest therein in the Redwood Creek Ranch area.

19. In the event of any dispute arising relative to performance of any part of this agreement or the price to be paid or damages to be received for non-performance or any other term hereof, and failing in an amicable settlement or adjustment the same shall be submitted to arbitration upon the following manner and terms:

(a) Either party may demand in writing that a particular matter be arbitrated, the contention of such party, and the name and address of such parties designated arbitrator.

(b) Within twenty days after receipt of such written notice the other party must serve in writing upon the demanding party a notice stating the scope of the matter to be arbitrated, the contention of such party, and the name and address of their designated arbitrator.

(c) In the event of the failure of party receiving demand of arbitration to appoint an arbitrator within the time specified, such failure shall operate as a waiver of the right of representation in the arbitration.

(d) The two arbitrators so selected (or the one) shall select a third and the arbitrators so selected shall decide the issue forthwith, including the terms for payment or curing of default, and their decision shall be final and conclusive upon the parties hereto provided their decision notice from demanding

party, or any further period designated by the panel of arbitrators.

(e) Each party shall pay all expenses of the arbitration selected by each party and one-half of the expenses of the third arbitrator.

(f) Any and all arbitrators selected must be residents of the County of Humboldt and familiar with logging, milling log scales therein, and must be qualified by experience and tending to act. No person having any interest either actual or contingent or prospective may act.

20. Any notice provided for in this agreement shall be deemed made if deposited in the U. S. Mail with postage prepaid as follows:

To: Snow Camp Logging Co., Box 605,
Arcata, California.

To: S. A. Peters, Box 426, Eugene, Oregon.

This agreement is binding upon the heirs, representatives and assigns of the parties hereto respectively.

In Witness Whereof, the parties have set their hands the day first above written.

.....,
Buyer.

.....,
.....,
Sellers.

EXHIBIT B

In the Superior Court of the State of California
in and for the County of Humboldt

No. 28851

SNOW CAMP LOGGING CO., a Corporation,

Plaintiff,

vs.

S. A. PETERS and TIMBER INCORPORATED
OF CALIFORNIA, a Corporation,

Defendants.

COMPLAINT FOR MONEY DUE AND
FOR BREACH OF CONTRACT

Plaintiff complains of Defendants and for cause
of action alleges:

That in May of 1951, Clarence Vander Jack and
Clarence C. Vander Jack, a partnership doing
business as Snow Camp Logging Company, as
sellers, entered into an agreement in writing with
S. A. Peters, as buyer, a copy of which agreement
is hereto annexed and designed "Exhibit A" and by
this reference incorporated herein. That said part-
nership has complied with Section 2566 of the
Civil Code. That plaintiff herein is a corporation
organized and existing under the laws of the State
of California. That prior to the commencement of
this action the rights of seller were assigned to
plaintiff which is the present owner and holder

thereof. That Timber Incorporated is a corporation organized and existing pursuant to the laws of the State of California. That prior to the commencement of this action, Timber Incorporated of California did assume the obligation of buyer. That defendants did consent to the assignment to plaintiff. That S. A. Peters is an officer of Timber Incorporated of California and all of the acts of S. A. Peters herein mentioned are within the scope of his authority.

II.

That Plaintiff has made, done and performed all of the promises, covenants and conditions to be made, done and performed by seller.

III.

That pursuant to said agreement plaintiff did deliver to defendants during the period July 16, 1953, to October 21, 1953, logs of a total footage of 7,111,150 board feet Spaulding log scale and did bill defendants a total sum of Two Hundred Sixty Thousand, Seven Hundred Ten and 46/100 Dollars (\$260,710.46) therefor. That defendants have paid to plaintiff the sum of Two Hundred Forty-six Thousand One Hundred Forty-six and 23/00 Dollars (\$246,146.23) for said logs.

IV.

That attached hereto and designated exhibit "b" to said complaint is a statement of account for said period. That the amounts at which the logs were billed was equal to the Arcata Price less Four

Dollars (\$4.00) per thousand at the time of the deliveries. That plaintiff did demand payment at the price billed at September 11, 1953, and did notify defendants that failure to pay as billed would constitute a default.

V.

That plaintiff did object to the amounts paid and did demand arbitration upon the amounts due. That arbitration was commenced and was unsuccessful and was not completed. That the period within which arbitration must have been completed has passed.

VI.

That plaintiff has demanded payment of the sum of Fourteen Thousand Five Hundred Sixty-four and 23/100 Dollars (\$14,564.23) Dollars but that defendants have refused to pay the same or any part thereof and said sum is presently due, owing and unpaid.

Wherefore, etc.,

Second Cause of Action

As and for a separate and second cause of action, plaintiff alleges:

VII.

Plaintiff hereby refers to and adopts as a part of his second cause of action, all of the allegations in paragraphs I and II of plaintiff's first cause of action.

VIII.

That on September 14, 1953, arbitration was instigated by plaintiff upon a disagreement of price. That this arbitration has never been completed and was not successful. That the time for completion of arbitration has passed.

IX.

That on October 16, 1953, the defendants, in breach of said written agreement, did substitute for the scaler formerly mutually employed and acceptable to both parties, a new scaler. That said new scaler was not a bureau scaler and was not acceptable nor accepted by plaintiff. That Defendants gave no notice of said substitution to plaintiff. That thereafter, defendants refused to permit the former scaler to scale the logs being delivered by plaintiff to defendants.

X.

That thereafter, on October 21, 1953, the defendants refused to accept any further logs from plaintiff and did refuse to permit plaintiff to dump logs in the log pond of defendants and did refuse to scale the logs delivered and tendered for delivery by plaintiff and did refuse to deliver a duplicate scale ticket to plaintiff and did inform plaintiff that defendants would pay at an arbitrarily fixed price, without regard to the contract price, or not at all. That plaintiff has been thereby damaged in the sum of Eight Hundred Thousand Dollars (\$800,000.00).

XI.

That on September 30, 1953, and thereafter, the defendants did fail, neglect and refuse to keep the log dump free and clear for the delivery of further logs. That by reason thereof, the log trucks of plaintiff were caused to wait and be idle and the men and equipment of plaintiff's operation were caused to wait and be idle all to plaintiff's damages in the sum of Twenty Thousand Dollars (\$20,000.00).

XII.

That in the spring of 1953 S. A. Peters, for himself and Timber Incorporated, and acting within the scope of his authority as an officer thereof, did verbally agree with plaintiff for an increased delivery of logs to the mill of defendants to permit defendants to deck between fifteen million and twenty million feet of logs and to cut an average of two hundred fifty thousand feet of logs per day during the summer and fall logging season and to accept a reduced price for the logs decked. That defendants have failed, neglected and refused to accept logs in the quantity verbally agreed upon, but have accepted only a lesser quantity in the approximate amount of one hundred twenty thousand feet per day total. That plaintiff has been compelled to sell the excess logs manufactured upon the open market all to plaintiff's damages in the sum of Eighty Thousand Dollars (\$80,000.00).

XIII.

That on or about October 16, 1953, the defend-

ants commenced the purchase of logs from other log producers, without the consent of plaintiff. That plaintiff is informed and believes and upon such ground alleges that defendants have purchased in excess of eight million feet of logs to this date. That plaintiff has had a supply of logs and has been in continuous operation and has been ready, able and willing to supply said logs during period. That plaintiff has been thereby damaged in the sum of Eighty Thousand Dollars (\$80,000.00).

Wherefore, etc.

Third Cause of Action

As and for a separate and third cause of action, plaintiff alleges:

XIV.

Plaintiff hereby refers to and adopts as this part of his third cause of action, all of the allegations in paragraphs I and II of plaintiff's first cause of action.

XV.

That on June 10, 1953, at the request of defendants, plaintiff did process the scale on logs delivered, and defendants did verbally agree to pay to plaintiff the cost thereof in the sum of Two Hundred Fifty-Three and 57/100 Dollars (\$253.57).

XVI.

That on August 6, 1953, and for fourteen (14)

days prior thereto, plaintiff alone did pay the scaler and defendants did agree to pay to plaintiff one-half ($\frac{1}{2}$) the cost thereof in the sum of Seventy Dollars (\$70.00.)

XVII.

That on August 19, 1953, additional log scale tickets were purchased by plaintiff from the Arcata Union and defendants did verbally agree to repay to plaintiff one-half ($\frac{1}{2}$) the cost thereof in the sum of Thirty-Seven and 15/100 Dollars (\$37.15).

XVIII.

That plaintiff has demanded payment of said sums of Two Hundred and Fifty-three and 57/100 Dollars (\$253.57), Seventy Dollars (\$70.00) and Thirty-seven and 15/100 Dollars (\$37.15) but defendants have refused to pay the same or any part thereof and the sum of Three Hundred Sixty and 72/100 Dollars (\$360.72) is presently due, owing and unpaid.

Wherefore, etc.

Fourth Cause of Action.

As and for a separate and fourth cause of action, plaintiff alleges:

XIX.

Plaintiff hereby refers to and adopts as this part of his fourth cause of action all of the allega-

tions in Paragraphs I and II of plaintiff's first cause of action.

XX.

That on or about September 30, 1953, the dump crew of defendants, acting within the course of their employment, did negligently damage the truck reach upon one of the trucks of plaintiff. That as the proximate result thereof, plaintiff did sustain damages in the sum of Five Hundred Sixty-eight and 44/100 Dollars (\$568.44).

Wherefore, etc.,

Fifth Cause of Action

As and for a fifth and separate cause of action, plaintiff alleges:

XXI.

Plaintiff hereby refers to and adopts as this part of his fifth cause of action, all of the allegations in paragraphs I and II of plaintiff's first cause of action.

XXII.

That plaintiff is informed and believes, and upon such ground alleges that defendants have acquired an interest or interests in timber lands in the Redwood Creek Ranch Area. That defendants have not offered to plaintiff a one-half ($\frac{1}{2}$) interest acquired by defendants. That plaintiff is informed and believes and upon such ground alleges that the value of one-half interest acquired by defendants is in excess of Fifty Thousand Dollars (\$50,000.00.) That

plaintiff has money for pay for a one-half ($1\frac{1}{2}$) share.

Wherefore, Plaintiff prays judgment as follows:

1. On the first cause of action for money due in the sum of Fourteen Thousand Five Hundred Sixty-Four and $23/100$ Dollars (\$14,564.23).

2. On the second cause of action for damages in the sum of Nine Hundred Eighty Thousand Dollars (\$980,000.00).

3. On the third cause of action for money due in the sum of Three Hundred Sixty and $72/100$ Dollars (\$360.72).

4. On the fourth cause of action for damages in the sum of Five Hundred Sixty-eight and $44/100$ Dollars (\$568.44).

5. On the fifth cause of action for damages in the sum of Fifty Thousand Dollars (\$50,000.00).

For costs of suit and for such other and further relief as to the court shall seem just and proper in the premises.

MATHEWS & TRAVERSE,
Attorneys for Plaintiff.

EXHIBIT C

In the Superior Court of the State of California
in and for the County of Humboldt

No. 28851

SNOW CAMP LOGGING CO., a Corporation,
Plaintiff and Cross-Defendant,

vs.

S. A. PETERS and TIMBER INCORPORATED
OF CALIFORNIA, a Corporation,
DEFENDANTS AND CROSS-COMPLAIN-
ANTS, ANSWER AND CROSS-COMPLAINT

Answer

Come now the Defendants above named, and answering Plaintiff's First Cause of Action contained in said complaint on file herein, admit, deny and allege as follows

I.

Answering Paragraph II of said First Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations in Paragraph II contained, and each and every part thereof.

II.

Answering Paragraph III of said First Cause of Action, said Defendants admit that they paid the sum of Two Hundred Forty-Six Thousand One Hundred Forty-Six and 23/100 Dollars (\$246,146.23) to Plaintiff herein, and allege that said pay-

ments were in full for the quantity of logs received from said Plaintiff at the agreed price, but deny generally and specifically, each and every, all and singular, the remaining allegations of said Paragraph III.

III.

Answering Paragraph IV of said First Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations in said Paragraph IV contained, and each and every part thereof.

IV.

Answering Paragraph V of said First Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations in said Paragraph V contained, and each and every part thereof.

V.

Answering Paragraph VI of said First Cause of Action, said Defendants deny that they or either of them is indebted to Plaintiff in the sum of Fourteen Thousand Five Hundred Sixty-Four and 23/100 Dollars (\$14,564.23), or in any other sum or sums, or at all.

Answering Plaintiff's Second Cause of Action contained in said complaint on file herein, said Defendants admit, deny and allege as follows:

I.

Said Defendants incorporate herein by reference the allegations contained in Paragraph I of Defend-

ants' Answer to the First Cause of Action, with like force and effect as though the same were set out herein in full.

II.

Answering Paragraph VIII of said Second Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations therein contained, and each and every part thereof.

III.

Answering Paragraph IX of said Second Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations contained therein, and each and every part thereof.

IV.

Answering Paragraph X of said Second Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations therein contained, and each and every part thereof and specifically deny that said Plaintiff was damaged in the sum of Eight Hundred Thousand Dollars (\$800,000.00) or any other sum or sums, or at all.

V.

Answering Paragraph XI of said Second Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations therein contained, and each and every part thereof, and specifically deny that said Plaintiff was damaged in the sum of Twenty Thousand Dollars (\$20,000.00) or any other sum or sums, or at all.

VI.

Answering Paragraph XII of said Second Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations therein contained, and each and every part thereof, and specifically deny that said Plaintiff was damaged in the sum of Eighty Thousand Dollars (\$80,000.00) or any other sum or sums or at all.

VII.

Answering Paragraph XIII of said Second Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations therein contained, and each and every part thereof and specifically deny that said Plaintiff was damaged in the sum of Eighty Thousand Dollars (\$80,000.00) or any sum or sums or at all.

Answering Plaintiff's Third Cause of Action, said Defendants admit, deny and allege as follows:

I.

Said Defendants incorporate herein by reference the allegations contained in Paragraph I of Defendants' Answer to the First Cause of Action, with like force and effect as though the same were set out herein in full.

II.

Answering Paragraph XV of the Third Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the al-

legations in said Paragraph contained, and each and every part thereof and specifically deny that they or either of them is indebted to said Plaintiff in the sum of Two Hundred Fifty-three and 57/100 Dollars (\$253.57) or in any other sum or sums or at all.

III.

Answering Paragraph XVI of said Third Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations in said paragraph contained, and each and every part thereof, and specifically deny that they or either of them is indebted to said Plaintiff in the sum of Seventy Dollars (\$70.00) or in any other sum or sums or at all.

IV.

Answering Paragraph XVII of said Third Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations in said Paragraph contained, and each and every part thereof, and specifically deny that they or either of them is indebted to said Plaintiff in the sum of Thirty-Seven and 15/100 Dollars (\$37.15) or in any other sum or sums at all.

V.

Answering Paragraph XVIII of said Third Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations in said paragraph contained, and

each and every part thereof, and specifically deny that they or either of them is indebted to said Plaintiff in the sum of Three Hundred Sixty and 72/100 Dollars (\$360.72) or in any other sum or sums or at all.

Answering Plaintiff's Fourth Cause of Action said Defendants allege, admit and deny as follows:

I.

Said Defendants incorporate herein by reference the allegations contained in Paragraph I of Defendants' answer to the First Cause of Action, with like force and effect as though the same were set out herein in full.

II.

Answering Paragraph XX of said Fourth Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations in said paragraph contained, and each and every part thereof, and specifically deny that they or either of them is indebted to Plaintiff by reason of damages sustained in the sum of Five Hundred Sixty-Eight and 44/100 Dollars (\$568.44) or in any other sum or sums or at all.

Answering Plaintiffs' Fifth Cause of Action, said Defendants admit, deny and allege as follows:

I.

Said Defendants incorporate herein by reference the allegations contained in Paragraph I of De-

fendants' Answer to the First Cause of Action, with like force and effect as though the same were set out herein in full.

II.

Answering Paragraph XXII of said Fifth Cause of Action, said Defendants deny generally and specifically, each and every, all and singular the allegations in said Paragraph XXII contained, and each and every part thereof, and specifically deny that said Plaintiff was damaged in the sum of Fifty Thousand Dollars (\$50,000.00) or any other sum or sums or at all.

Wherefore, said Defendants pray that Plaintiff take nothing by its said action, and that said Defendants be hence dismissed with their costs of suit herein incurred.

EXHIBIT D

Cross-Complaint

As and for a Cross-Complaint herein, Defendants and Cross-Complainants complain of Plaintiff and Cross-Defendant and for cause of action allege as follows:

I.

That on or about the 1st day of June, 1951, Clarence Vander Jack and Clarence C. Vander Jack, a partnership doing business as Snow Camp Logging Company, Sellers; and S. A. Peters, Buyer; entered into agreement, a copy of which is

attached to the original complaint on file herein, marked "Exhibit A," and made a part thereof by reference; that said partnership has complied with Section 2466 of the Civil Code; that Plaintiff and Cross-Defendant herein is a corporation organized and existing under the laws of the State of California; that prior to the commencement of this action the rights of seller were assigned to Plaintiff and Cross-Defendant, the present owner and holder thereof; that prior to the commencement of this action, Timber Incorporated of California assumed the obligations of Buyer.

II.

That on or about November 1, 1953, Plaintiff and Cross-Defendant did fail and refuse to deliver logs pursuant to said agreement, and Defendants and Cross-Complainants are informed and believe and therefore allege that Plaintiff and Cross-Defendant will continue to fail and refuse to deliver logs to Defendants and Cross-Complainants during the remainder of the life of said aforementioned agreement; that the remainder of the life of said agreement, according to Section 7 of said agreement, provides for eight (8) years; that said Defendants and Cross-Complainants are accruing damages by reason of the afore mentioned at the rate of One Hundred Thousand Dollars (\$100,000.00) per year, and will continue to be damaged at said rate for the remainder of the life of said agreement to their total damages of not less than Eight Hundred Thousand Dollars (\$800,000.00).

III.

That prior to November 1, 1953, Plaintiff and Cross-Defendant delivered logs to Defendants and Cross-Complainants which were not the better grade logs logged by Plaintiff and Cross-Defendant; that said better grade logs were sold by Plaintiff and Cross-Defendant to other parties to the further damage of said Defendants and Cross-Complainants in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, Defendants and Cross-Complainants pray judgment against Plaintiff and Cross-Defendant as follows:

1. For the sum of \$800,000.00.
2. For the sum of \$100,000.00.
3. For costs of suit herein incurred.
4. For such other and further relief as to the Court may seem proper in the premises.

HUBER & GOODWIN,

By NORMAN C. CISSNA,

Attorneys for Defendants and
Cross-Complainants.

[Endorsed]: Filed January 11, 1956, Referee.

In the Northern Division of the United States District Court for the Northern District of California

No. 14388 in Bankruptcy

In the Matter of:

SNOW CAMP LOGGING COMPANY, a Copartnership Composed of CLARENCE VANDER JACK, CLARENCE C. VANDER JACK and HORACE MECKLEM, JR., and JEANNE V. MECKLEM; CLARENCE VANDER JACK, CLARENCE C. VANDER JACK and HORACE MECKLEM, JR., and JEANNE V. MECKLEM, Individually,

Bankrupts.

TRUSTEE'S PETITION FOR ORDER DISALLOWING CLAIM UNDER SECTION 57 (d) OF THE BANKRUPTCY ACT AND FOR JUDGMENT FOR AFFIRMATIVE RELIEF

To the Honorable Burton J. Wyman, Referee in Bankruptcy:

The petition of Kal W. Lines, the duly appointed, qualified and acting Trustee of the estates of the bankrupts above named, respectfully represents:

On January 11, 1956, S. A. Peters, an individual and Timber Incorporated of California, a corporation, organized and existing under the laws of the State of California, and carrying on business in the District aforesaid, filed a joint claim herein, being

Claim No. 50 of the files of the above-entitled court, for the sum of \$900,000.00, which said claim, on the face thereof, is unliquidated. Petitioner is informed and believes and therefore alleges that said purported claim is covered by an Answer and Cross-Complaint and/or an Amended Answer and Cross-Complaint to an action commenced in the Superior Court of the State of California, in and for the County of Humboldt, entitled "Snow Camp Logging Co., a corporation, Plaintiff, vs. S. A. Peters and Timber Incorporated of California, a corporation, Defendants," being No. 28851 of the files of the clerk of said Superior Court. That prior to the bankrupt partnership, Snow Camp Logging Company, without any consideration whatsoever, assigned its claim against the aforesaid defendants to Snow Camp Logging Co., a corporation, and said claim is a valuable asset of the estate of said bankrupt copartnership, Snow Camp Logging Company; that said State Court action brought by said assignee, Snow Camp Logging Co., a corporation, is in five (5) counts aggregating \$1,045,493.39, representing various breaches of an agreement in writing, a copy of which said agreement is annexed to said claim No. 50.

Petitioner, as Trustee herein, objects to the allowance of said Claim No. 50 for the reason that said claim on its face shows that it is unliquidated and cannot be allowed under the provisions of Section 57(d) of the Bankruptcy Act unless and until the same is liquidated upon the issues raised by the

pleadings attached to said purported claim, and any and all amended pleadings filed herein in connection with said purported claim, including all of the defenses made and to be made by your petitioner as Trustee herein as well as the establishment of the claim as alleged in said complaint on file in said State Court action wherein a judgment for damages against claimants for breach of said agreement in writing is sought.

Wherefore, your petitioner prays that the said Claim No. 50, in the amount of \$900,000.00 filed herein by S. A. Peters and Timber Incorporated of California, a corporation, be disallowed in its entirety and that the claims of your petitioner as Trustee of the estate of the bankrupt partnership, Snow Camp Logging Company, the assignor of said claims, without consideration to Snow Camp Logging Company, a corporation, be reduced to and a judgment herein rendered in favor of petitioner as Trustee herein and against S. A. Peters and Timber Incorporated of California, a corporation, said claimants for the sum of \$1,045,493.39, and that your petitioner have such other and further relief as is just and proper in the premises.

/s/ KAL W. LINES,
Trustee.

/s/ MAX H. MARGOLIS,
Attorney for Trustee.

Duly Verified.

[Endorsed]: Filed October 3, 1956, Referee.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading and consideration of Trustee's Petition for Order Disallowing Claim Under Section 57(d) of the Bankruptcy Act and for Judgment for Affirmative Relief, filed herein this day by Kal W. Lines, the duly appointed, qualified and acting Trustee herein and good cause appearing therefor, it is hereby ordered that S. A. Peters and Timber Incorporated of California, a corporation be and appear before the undersigned Referee in Bankruptcy at his courtroom, Room 609 Grant Building, 1095 Market Street, San Francisco, District aforesaid at 10:00 o'clock a.m. on November 7, 1956, then and there to show cause if any, they or either of them have, why an order should not be made and entered herein granting the prayer of Trustee's said petition; and

It is further ordered that service hereof shall be made upon said respondents and each of them, by mailing a certified copy of this order, annexed to a true and correct copy of said petition to said respondents and their attorneys of record, Messrs. Huber & Goodwin, not later than five (5) days prior to the hearing hereof as aforesaid.

Dated: San Francisco, in said District, October 3rd, 1956.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed October 3, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF G. EDWARD GOODWIN IN
SUPPORT OF MOTION FOR WITH-
DRAWAL OF CLAIM

State of California,
City and County of San Francisco—ss.

G. Edward Goodwin, being duly sworn, deposes and says:

That he is one of the attorneys for the claimants, S. A. Peters and Timber Incorporated of California, a corporation, who have on file in the above-entitled proceeding claim No. 50 in the face amount of Nine Hundred Thousand (\$900,000) Dollars. That said claim is an outgrowth of certain litigation now pending in the Superior Court of the State of California in and for the County of Humboldt, arising under the following circumstances, to wit: That long prior to the filing of the petition in bankruptcy herein, claimants and the above-named bankrupts entered into a contract for the purpose of furnishing to claimants certain timber as fodder for claimants' sawmill. That a disagreement arose between said bankrupts and claimants, following which, bankrupts assigned to a corporation any and all rights that they might have against claimants arising under an asserted breach of said contract. That on the 14th day of February, 1953, the assignee corporation filed suit against claimants in the said Superior Court, claiming damages and other contractual obligations due to them in the gross amount

of One Million Forty-five Thousand Four Hundred Ninety-three and 39/100 (\$1,045,493.39) Dollars. That claimants cross-complained in said action long prior to the filing of the petition in bankruptcy herein in the sum of Nine Hundred Thousand (\$900,000) Dollars. That after various pleadings and motions had been made in said proceeding in said Humboldt County Superior Court, said action has now been set for trial on the 26th day of November, 1956, in the Courtroom of said Court, Veterans' Memorial Building, 10th and H Streets, Eureka, California, at the hour of 10:00 a.m., and notice thereof has been given to the parties by the Clerk of said Court, and witnesses summoned and the participating principals alerted.

That ever since July 16, 1956, the attorneys for the Trustee, Max H. Margolis and Frederick L. Hilger, have been attorneys of record representing the plaintiff in Humboldt County Superior Court in said action. That it affirmatively appears from the pleadings on file in said action and from the various documents on file herein that full and absolute relief can be granted the parties in said Superior Court action in Humboldt County. That said claimant has submitted to the jurisdiction of the Humboldt County Superior Court in said action and early trial of said action can be had, to wit: Beginning on the 26th day of November, 1956. The precise questions before the above-entitled Court are presently before the Superior Court in and for the County of Humboldt, and an immediate hearing

thereon and a disposition thereof can be had and constitute a reasonable method of litigating the issues arising therein. In the event a judgment should be had in said action, execution can issue thereon without further delay, thus preserving to the parties their right of prompt and immediate disposition of said action.

That the motion of the claimants to withdraw their claim from the bankruptcy proceeding should be granted.

/s/ G. EDWARD GOODWIN.

Sworn to and subscribed before me this 5th day of November, 1956.

[Seal] /s/ RUTH CRAIG,

Notary Public in and for Said
City, County and State.

My commission expires: 10-20-58.

Receipt of copy acknowledged.

[Endorsed]: Filed November 7, 1956, Referee.

[Title of District Court and Cause.]

**MOTION FOR ORDER AUTHORIZING WITH-
DRAWAL OF CLAIM OF S. A. PETERS
AND TIMBER INCORPORATED OF CALI-
FORNIA**

Now come S. A. Peters and Timber Incorporated of California, a corporation, claimants herein, and

move the above-entitled Court for an order authorizing the withdrawal of claim No. 50 on file herein in the sum of Nine Hundred Thousand (\$900,000) Dollars on the condition that claimants, defendants and cross-complainants in an action entitled "Snow Camp Logging Co., a Corporation, Plaintiff, vs. S. A. Peters and Timber Incorporated of California, a Corporation, Defendants," being No. 28851 amongst the files and records of the Superior Court in and for the County of Humboldt, State of California, proceed to trial on the date it is now set for trial, to wit: The 26th day of November, 1956, in said Superior Court of Humboldt County, State of California.

That claimant is prepared, ready and willing to proceed with the trial of said action at said time and place.

Said motion is made on all of the records and files of the above-entitled Bankruptcy Court, and on the affidavit of G. Edward Goodwin, one of the attorneys for said claimant.

CHARLES M. STARK,
PAUL W. McCOMISH,
L. W. WRIXON,
HUBER & GOODWIN,

By /s/ L. W. WRIXON,
Attorneys for S. A. Peters,
et al.

Receipt of copy acknowledged.

[Endorsed]: Filed November 7, 1956.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE; MOTION TO DISCHARGE ORDER TO SHOW CAUSE, AND PLEA IN ABATEMENT

Now comes S. A. Peters, an individual, and Timber Incorporated of California, a corporation, and make this, their return to a petition and order to show cause issued thereon directed to them by the above-entitled court dated October 3, 1956, and admit, deny and affirmatively allege as follows, to wit:

I.

That on the 14th day of December, 1953, there was filed in the office of the Clerk of the Superior Court of the State of California in and for the County of Humboldt a complaint for money alleged to be due plaintiff Snow Camp Logging Company, a corporation, as distinguished from the bankrupt partnership, in the sum of \$15,493.39 and for damages alleged to have been suffered by plaintiff in the sum of \$1,030,568.44, said action was numbered 28851 amongst the records and files of said county, and a Summons, pursuant to the filing of said complaint was forthwith issued from said court. Ever since then said action has been and now is pending therein.

II.

That in paragraph I of said complaint it is alleged as follows, to wit:

“That in May of 1951, Clarence Vander Jack and Clarence C. Vander Jack, a partnership doing business as Snow Camp Logging Company, as sellers, entered into an agreement in writing, a copy of which agreement is hereto annexed and designated Exhibit ‘A’ and by this reference incorporated herein. That said partnership has complied with Section 2466 of the Civil Code. That plaintiff herein is a corporation organized and existing under the laws of the State of California. That prior to the commencement of this action the rights of Seller were assigned to plaintiff which is the present owner and holder thereof. That Timber Incorporated is a corporation organized and existing pursuant to the laws of the State of California. That prior to the commencement of this action Timber Incorporated did assume the obligations of buyer. That defendants did consent to the assignment to plaintiff. That S. A. Peters is an officer to (sic) Timber Incorporated of California and all the acts of S. A. Peters herein mentioned are within the scope of his authority.”

Thereafter further proceedings were had in said action and in said court as follows, to wit:

(a) On March 4, 1954, defendants’ answer and cross-complaint was filed.

(b) On March 11, 1954, plaintiff’s answer to the cross-complaint was filed.

(c) On March 11, 1954, a memorandum of motion to set cause for trial was filed.

(d) On July 16, 1956, a substitution of attorneys was filed, substituting Max H. Margolis, Esq., and Frederick L. Hilger in place of the attorneys of record for the plaintiff.

(e) On July 16, 1956, plaintiffs' demand for a jury trial was filed and jury fees were deposited with the Clerk of the Court.

(f) On August 17, 1956, Notice of time and place of trial was filed in which notice the attorneys for plaintiff gave as the time and place of trial to be the 1st day of October, 1956, in the Courtroom in the Veterans' Memorial Building, Tenth and H Streets, Eureka, California.

(g) On the 8th day of October, 1956, said action was rested for trial on November 26, 1956, and is now scheduled for trial on said date in the courtroom of the Veterans' Memorial Building, Tenth and H Streets, Eureka, California, and notice thereof has been given to the parties by the Clerk of said Court.

III.

That it affirmatively appears from the pleadings and documents on file herein that the Superior Court of the State of California in and for the County of Humboldt in said action Number 28851 now pending therein first took cognizance of and thereby obtained exclusive jurisdiction over the matters and things constituting the subject matter of the petition of the trustee for an order to show cause herein.

IV.

That it affirmatively appears from the pleadings and documents on file herein that the above-named bankrupt, a co-partnership, and the plaintiff, a corporation in the state, court action referred to in the trustee's petition are not one and the same person but that the bankrupt is a co-partnership and the plaintiff in the State court is a corporation.

V.

That it affirmatively appears from the pleadings and documents on file herein that the claim referred to in the trustee's petition for an order to show cause herein will be liquidated and is capable of being liquidated in the action No. 28851 now pending and set for trial in the Superior Court of the State of California in and for the County of Humboldt entitled Snow Camp Logging Co., a corporation, plaintiff, vs. S. A. Peters and Timber Incorporated of California, a Corporation.

VI.

That it affirmatively appears from the trustee's petition for an order to show cause herein and the pleadings and documents on file herein that any effort on the part of the trustee herein to establish invalidity of the assignment of the cause of action alleged in said state court action, Number 28851, is barred by the Statute of Limitations set forth in Section 67 d.(2) of the Bankruptcy Act.

Wherefore, S. A. Peters and Timber Incorporated of California, a corporation, respondents herein,

having fully answered the petition of the trustee herein for an order to show cause pray that said order to show cause be vacated and discharged and the petition therefore be dismissed.

L. W. WRIXON,
CHARLES M. STARK,
PAUL W. McCOMISH,
HUBER & GOODWIN,

By /s/ G. EDWARD GOODWIN,
Attorneys for Respondent.

Duly verified.

[Endorsed]: Filed November 7, 1956, Referee.

[Title of District Court and Cause.]

BILL OF PARTICULARS

To: Max H. Margolis, attorney for Kal W. Lines,
Trustee herein:

You Will Please Take Notice that the following is a Bill of Particulars of the claimants, S. A. Peters and Timber Incorporated of California, a corporation, in their claim against the above-named bankrupts filed herein pursuant to an order of court that same be filed, to wit:

1. Damages resulting from the failure of the bankrupt herein and its assignee, Snow Camp Logging Company, a corporation, to deliver logs for a period of eight (8) years as required by the contract, a copy of which is attached to claimants'

claim, resulting in the necessity that claimants purchase logs elsewhere on the open market wherever same might be or become available at an estimated increased expense to claimant of \$100,000 per year for the term of said contract, or \$800,000.

2. Damage to claimant resulting from the inferior quality of logs delivered to claimants' mill pond during 1952 and 1953 in an estimated volume of 20,000,000, paid for at a price of not less than \$5.00 per thousand feet in excess of the actual market value of such logs, \$100,000.

3. Total: \$900,000.

CHARLES M. STARK,
PAUL W. McCOMISH,

By /s/ CHARLES M. STARK.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed November 27, 1956.

[Title of District Court and Cause.]

NOTICE OF DECISION

To Kal W. Lines, Trustee in Bankruptcy Herein, and Max H. Margolis, Esq., and Frederick L. Hilger, Esq., Attorneys for Said Trustee, and to S. A. Peters and Timber Incorporated of California, and L. W. Wrixon, Esq., Charles Mr. Stark, Esq., Paul W. McComish, Esq., and

Messrs. Huber & Goodwin, Attorneys for Said S. A. Peters and Timber Incorporated of California:

You, and Each of You, Will Please Take Notice that the undersigned referee in bankruptcy (after due and careful consideration of the record herein and particularly of the testimony of the various witnesses herein whether such witnesses testified in support of the claim of S. A. Peters and/or Timber Incorporated of California, or in support of the "Trustee's Petition for Order Disallowing Claim Under Section 57(d) of the Bankruptcy Act and for Judgment for Affirmative Relief," did not, and now does not, believe the witnesses, and particularly the witness, S. A. Peters, who testified in support of said claim and said claimants, wherein the testimony of such last mentioned witnesses, and particularly the witness, S. A. Peters, was contrary to, and in contradiction of, the testimony of the witnesses, and particularly contrary to, and in contradiction of, the witness, Clarence C. Vander Jack, all of whom testified in support of the trustee's aforesaid petition, and, because said undersigned referee in bankruptcy finds that, with the exception of the amount claimed by said trustee, i.e., the sum of \$1,045,493.39, the allegations contained in said petition of said trustee are true and correct and that the allegations contained in the aforesaid claim of said claimants are not true, or correct, and further finds that the sum of \$674,627.47 is the true and correct sum that should have been set forth in

trustee's said petition) has this day decided, and hereby announces the decision of the court to be, that (1) the claim of said S. A. Peters and Timber Incorporated of California should be disallowed in its entirety and that (2) the trustee herein is entitled, affirmatively, to have an order, judgment and decree signed and filed herein in said sum of \$674,-627.47 against S. A. Peters and Timber Incorporated of California.

The court herein and hereby directs that counsel for said trustee, within fifteen (15) days of the date of this notice of decision, prepare and serve upon counsel for the claimants hereinbefore referred to, a copy of said trustee's proposed findings of fact, in such detail as is justified by the record, including the evidence offered and received by the court, together with the proposed conclusions of law, and, thereafter, but within said fifteen (15) day period, Lodge the original of such proposed findings of fact, in detail, together with such conclusions of law, with the undersigned referee in bankruptcy, at Room 607 Grant Building, 1095 Market Street, San Francisco, California.

That, within fifteen (15) days after counsel for the trustee shall have served the aforesaid copy of their proposed findings of fact and proposed conclusions of law upon counsel for the claimants herein, counsel for said claimants, if they deem it proper so to do, shall serve upon counsel for the trustee their proposed amendments, or alternates, of findings of fact and/or conclusions of law, and

within the period last mentioned herein, Lodge with the undersigned referee in bankruptcy, at the place hereinbefore designated, the original of their proposed amendment, or proposed alternates to the aforesaid proposed findings of fact and/or the aforesaid proposed conclusions of law.

The court hereby reserves the right to accept, or reject, in whole, or in part, any, or all, of the findings of fact and/or conclusions of law proposed, on behalf of the trustee and to do likewise with, any, or all, of the amendments, or alternates to the last mentioned findings of fact and/or conclusions of law proposed on behalf of the claimants, or either of them, and, if the circumstances shall make it necessary, the court also reserves the right to prepare, sign and file its own findings in fact, in detail, and/or its own conclusions of law, without further notice.

Dated: February 24, 1958.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed February 24, 1958, Referee.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The Court having heretofore given its Notice of Decision herein on February 24, 1958, now enters

and makes its Findings of Fact and Conclusions of Law in accordance therewith as follows:

Findings of Fact

1. That Kal W. Lines at all times after July 14, 1955, was the duly appointed, qualified and acting Trustee of the Estates of Clarence Vander Jack, Clarence C. Vander Jack and Snow Camp Logging Company, a co-partnership.

2. That Clarence Vander Jack, Clarence C. Vander Jack and Snow Camp Logging Company, a co-partnership, were all adjudged bankrupt on March 30, 1955, on a petition filed against them on February 14, 1955.

3. That on January 11, 1956, S. A. Peters, an individual, and Timber Incorporated of California, a corporation, organized and existing under the laws of the State of California, and carrying on business in the Northern District of California, filed a joint claim herein against the above-named bankrupts, being Claim No. 50 of the files of the above-entitled Court.

4. That the claim showed on its face that it was unliquidated.

5. That the claim showed on its face that it arose from the same contract and transaction on which the Trustee's Petition for Affirmative Relief arose.

6. That S. A. Peters and the bankrupts above named made, executed, and delivered, each to the

other, on or about the first day of June, 1951, a writing, received in evidence as Trustee's No. 1, entitled "Agreement."

7. That pursuant to said writing, said bankrupts were obligated to and did furnish all logs required by Peters and his successor in interest, Timber Incorporated of California, to and including October 21, 1953, and did submit to a Bureau scale and did pay one-half the cost thereof, and did give proper notice of default to Peters and Timber Incorporated of California, and did perform each and every, all and singular, the covenants and conditions by them to be performed under the said writing up to October 21, 1953; that Peters and Timber Incorporated of California made further performance impossible after October 21, 1953, by acts and omissions within their control.

8. That prior to October 21, 1953, Timber Incorporated of California assumed the obligations of Peters under the writing; that said bankrupts did not release Peters from his obligations thereunder.

9. That after June 1, 1951, and prior to October 21, 1953, Peters and Timber Incorporated of California did not buy all their log requirements from said bankrupts, and did during that period purchase logs from other suppliers.

10. That after June 1, 1951, and prior to October 21, 1953, said bankrupts delivered logs to Peters and Timber Incorporated of California, and Peters and Timber Incorporated of California did not pay

therefor the Arcata market price less \$4.00 per thousand board feet as provided in said writing, although said bankrupts demanded such payments; that as a direct result of refusal to pay such price, bankrupts were damaged in the sum of \$19,625.91; that at no time prior to October 21, 1953, was there any good faith dispute as to price stated in the writing, Trustee's No. 1, nor manner of computation thereunder.

11. That Peters and Timber Incorporated of California did not maintain a properly manned, adequate log dump, at its mill, and during the period June 1, 1953, to October 15, 1953, habitually and intentionally allowed the log dump to become and remain inoperative for long periods of time; that as a direct result of said log dump delays, said bankrupts' trucks were unable to be utilized normally and efficiently; that said bankrupts were damaged by loss of truck earnings in this period in the sum of \$30,931.57; that as a direct result of the refusal and intentional failure of Peters and Timber Incorporated of California to maintain the log dump in operating condition, the woods operation of said bankrupts was disorganized and wasteful of man hours and machinery time; that said bankrupts sustained damage as a result of such disruption of normal operating procedures in the sum of \$146,319.00; that it was the custom of the industry for the mill operator to maintain the log dump, and the responsibility and obligation of Peters and Timber Incorporated of California to maintain said

dump and efficiently unload trucks of said bankrupts; that Peters and Timber Incorporated of California had sole control of said dump.

12. That for several days prior to October 21, 1953, Peters and Timber Incorporated of California refused to use a Bureau scaler.

13. That on October 21, 1953, Peters and Timber Incorporated of California, did refuse to accept further delivery of logs from said bankrupts.

14. That on October 21, 1953, Peters and Timber Incorporated of California did refuse to give receipts or scale tickets for logs delivered.

15. That on October 21, 1953, Peters and Timber Incorporated of California declared their refusal to be bound by the writing received in evidence as Trustee's No. 1, and did declare their intention to abandon the price structure therein contained.

16. That the price structure within the said writing provided said bankrupts a \$2.31 per thousand board feet advantage compared to open market price.

17. That the acts of Peters and Timber Incorporated on October 21, 1953, and the several days preceding, made further performance and log deliveries by said bankrupts impossible.

18. That as a direct result of the acts of Peters and Timber Incorporated of California in rendering further performance impossible, said bankrupts were prevented from delivering logs after October 21,

1953, for the remaining term specified in the writing, Trustee's No. 1; that as a direct result of such prevention said bankrupts were damaged in the sum of \$477,750.99.

19. That at the time of the filing of the petition in bankruptcy herein said bankrupts owned the rights and property in and to said writing, Trustee's No. 1.

20. That on September 12, 1953, Peters and Timber Incorporated of California were not in full production on gang logs and that the demand made by them on that day was not made in good faith.

21. That on November 18, 1953, Peters and Timber Incorporated were not ready, willing, nor able to accept log deliveries according to the provisions of the writing, Trustee's No. 1, and the offer or tender made on that date was not made in good faith.

22. That prior to October 21, 1953, said bankrupts gave proper notice of default to Peters and Timber Incorporated of California and proper notice of intention to exercise election to terminate under the provisions of the writing, Trustee's No. 1.

23. That, except as here found to the contrary, or herein modified, the allegations contained in Trustee's Petition for Order Disallowing Claim under Section 57(d) of the Bankruptcy Act and for Judgment for Affirmative Relief are true.

24. That except as herein found expressly to the contrary, all the allegations contained in the claim

of S. A. Peters and Timber Incorporated of California, being numbered 50 in the files of this Court, are not true.

25. That the testimony of S. A. Peters and the various witnesses produced in his behalf and on behalf of Timber Incorporated of California, in all particulars where the same attempted to contradict or was offered in contradiction of the testimony and evidence offered by the Trustee herein, is not, and was not, true.

Conclusions of Law

Having found the above facts, the Court concludes:

1. That the writing, Trustee's No. 1 herein, was a valid, binding contract from the date of its execution, June 1, 1951, and for the ten year term therein specified.

2. That prior to October 21, 1953, Timber Incorporated of California became liable for the performance of the contract, and that S. A. Peters remained liable for its performance.

3. That said bankrupts herein performed all the covenants and conditions by them to be performed by them through October 21, 1953, and that they were excused from performance after such dates by the acts of S. A. Peters and Timber Incorporated of California.

4. That the acts of S. A. Peters and Timber Incorporated of California in failing and refusing to

pay the contract price specified, in purchasing logs from suppliers other than said bankrupts; in failing and refusing to maintain a proper log dump and hindering unloading of said bankrupts' product; in refusing to use a Bureau scaler; in refusing to accept or permit deliveries of logs from said bankrupts; in repudiating their obligations to purchase and pay for logs; in refusing to be bound by the terms of contract; each and every constituted a material and intentional breach of the contract on the part of S. A. Peters and Timber Incorporated of California.

5. That such breaches aforesaid made further performance by said bankrupts impossible after October 21, 1953, and hindered performance by said bankrupts from and after June 1, 1953.

6. That such breaches aforesaid and prevention of performance on the part of S. A. Peters and Timber Incorporated of California excused said bankrupts from further performance after October 21, 1953, and entitled them to terminate the contract and sue for damages sustained.

7. That as a direct result of the breaches aforesaid, said bankrupts sustained damages in the sum of \$674,627.47, for which they are entitled to judgment against S. A. Peters and Timber Incorporated of California, a corporation.

8. That the rights of said bankrupts passed by operation of law, as of February 14, 1955, to Kal W. Lines, Trustee and Petitioner herein, and judgment

should be entered in his favor as Trustee in Bankruptcy herein.

Therefore, let judgment be entered in favor of Kal W. Lines, Trustee in Bankruptcy for the Bankrupt Estate of Snow Camp Logging Company and against S. A. Peters and Timber Incorporated of California, a corporation, in the amount of Six Hundred Seventy-four Thousand, Six Hundred Twenty-seven Dollars and Forty-seven Cents (\$674,627.47).

Dated: San Francisco, in said District; March 22nd, 1958.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

Lodged March 4, 1958.

[Endorsed]: Filed March 22, 1958, Referee.

[Title of District Court and Cause.]

ORDER, JUDGMENT AND DECREE

This Court having filed its Notice of Decision on February 24, 1958, and the Court on March 24, 1958, having filed its Findings of Fact and Conclusions of Law as amended, directing judgment as hereinafter provided, it is

Ordered, Adjudged and Decreed that Kal W. Lines, as Trustee of the Estate of Snow Camp Logging Company, a co-partnership, have judgment and

that judgment be entered in his favor as such Trustee and against S. A. Peters and Timber Incorporated of California, a corporation, in the amount of \$674,627.47.

Dated: San Francisco, in said District; March 25th, 1958.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed March 25, 1958, Referee.

[Title of District Court and Cause.]

PROPOSED AMENDMENTS TO AND OBJEC-
TIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW PREPARED
AND PROPOSED BY THE TRUSTEE IN
BANKRUPTCY HEREIN

Come Now S. A. Peters and Timber Incorporated, and, pursuant to a "Notice of Decision" dated February 24, 1958, file these following proposed amendments to and objections to said findings of fact and conclusions of law prepared, filed and proposed by the Trustee in Bankruptcy herein, to wit:

I.

That said proposed findings of fact numbered 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 be refused on the grounds that there

is no support therefor in the record of the above-entitled Court.

II.

That the above-entitled Court make its finding that said Trustee is not the owner of any claim against S. A. Peters and Timber Incorporated.

III.

That said Court find that said Trustee is entitled to no "so-called affirmative relief" against S. A. Peters and Timber Incorporated.

As Conclusions of Law

That the prayer of said Trustee's petition for an order disallowing the claim of S. A. Peters and Timber Incorporated be denied insofar as it relates to the granting of a so-called judgment in favor of said Trustee and against S. A. Peters and Timber Incorporated in the sum of \$1,045,493.39 or any other sum or at all.

Dated at San Francisco, California, March ..., 1958.

.....,
Referee in Bankruptcy.

Lodged March 14, 1958, Referee.

Rejected March 22, 1958, Referee.

[Title of District Court and Cause.]

PETITION TO REVIEW REFEREE'S ORDER,
JUDGMENT AND DECREE DATED
MARCH 25, 1958

To the Honorable Burton J. Wyman, Referee in
Bankruptcy:

The petition of S. A. Peters and Timber Incorporated of California, a corporation, respectfully represents:

I.

That on the 3rd day of October, 1956, your petitioners and each of them were made respondents to an Order to Show Cause issued by the referee in bankruptcy pursuant to an application of trustee in bankruptcy herein in which he prayed that said referee make an order "Disallowing Claim, under Section 57(d) of the Bankruptcy Act and for judgment for affirmative relief."

II.

Thereafter petitioners made a special appearance herein, objecting to the jurisdiction of the above-entitled Court and for no other purpose, which objection was overruled by said referee. Thereupon, your petitioners filed in writing a motion for permission to withdraw their claim, which motion was denied. Thereupon, your petitioners made their return to said Order to Show Cause in writing, together with their Plea in Abatement, in writing, which Plea in Abatement was overruled and your

petitioners were directed to proceed with their defense to Trustee's petition for said Order to Show Cause on the merits.

III.

After the hearings and submission of said petition, and petitioners' defense on the merits thereto, You, the said Referee, on the 25th day of March, 1958, entered an order herein as follows:

* * *

IV.

That the said referee erred in the making of said Order. That said order was based upon Findings of Fact particularly complained of by petitioners, as follows:

"4. That the claim showed on its face that it was unliquidated.

"5. That the claim showed on its face that it arose from the same contract and transaction on which the Trustee's Petition for Affirmative Relief arose.

* * *

"7. That pursuant to said writings, said Bankrupts were obligated to and did furnish all logs required by Peters and his successor in interest, Timber Incorporated of California, to and including October 21, 1953, and did submit to a Bureau scale and did pay one-half the cost thereof, and did give proper notice of default to Peters and Timber Incorporated of California, and did perform each and

every, all and singular the covenants and conditions by them to be performed under the said writing up to October 21, 1953; that Peters and Timber Incorporated of California made further performance impossible after October 21, 1953, by acts and omissions within their control.

“8. That prior to October 21, 1953, Timber Incorporated of California assumed the obligations of Peters under the writing; that said bankrupts did not release Peters from his obligations thereunder.

“9. That after June 1, 1951, and prior to October 21, 1953, Peters and Timber Incorporated of California did not buy all their log requirements from said bankrupt, and did during that period purchase logs from other suppliers.

“10. That after June 1, 1951, and prior to October 21, 1953, said bankrupts delivered logs to Peters and Timber Incorporated of California, and Peters and Timber Incorporated of California did not pay therefor the Arcata market price less \$4.00 per thousand board feet as provided in said writing, although said bankrupts demanded such payments; that as a direct result of refusal to pay such price, bankrupts were damaged in the sum of \$19,625.91; that at no time prior to October 21, 1953, was there any good faith dispute as to price stated in the writing, Trustee's No. 1, nor manner of computation thereunder.

“11. That Peters and Timber Incorporated of California did not maintain a properly manned, ade-

quate log dump, at its mill, and during the period June 1, 1953, to October 15, 1953, habitually and intentionally allowed the log dump to become and remain inoperative for long periods of time; that as a direct result of said log dump delays, said bankrupt's trucks were unable to be utilized normally and efficiently; that said bankrupts were damaged by loss of truck earnings in this period in the sum of \$30,931.57; that as a direct result of the refusal and intentional failure of Peters and Timber Incorporated of California to maintain the log dump in operating condition, the woods operation of said bankrupts was disorganized and wasteful of man hours and machinery time; that said bankrupts sustained damage as a result of such disruption of normal operating procedures in the sum of \$146,319.00; that it was the custom of the industry for the mill operator to maintain the log dump, and the responsibility and obligation of Peters and Timber Incorporated of California to maintain said dump and efficiently unload trucks of said bankrupts; that Peters and Timber Incorporated of California had sole control of said dump.

“12. That for several days prior to October 21, 1953, Peters and Timber Incorporated of California refused to use a Bureau scale.

“13. That on October 21, 1953, Peters and Timber Incorporated of California, did refuse to accept further delivery of logs from said bankrupts.

“14. That on October 21, 1953, Peters and Tim-

ber Incorporated of California did refuse to give receipts or scale tickets for logs delivered.

“15. That on October 21, 1953, Peters and Timber Incorporated of California declared their refusal to be bound by the writing received in evidence as Trustee’s No. 1, and did declare their intentions to abandon the price structure therein contained.

“16. That the price structure within the said writing provided said bankrupts a \$2.31 per thousand feet advantage compared to open market price.

“17. That as a direct result of the acts of Peters and Timber Incorporated of California in rendering further performance impossible, said bankrupts were prevented from delivering logs after October 21, 1953, for the remaining term specified in the writing, Trustee’s No. 1; that as a direct result of such prevention said bankrupts were damaged in the sum of \$477,750.99.

* * *

“19. That at the time of the filing of the petition in bankruptcy herein said bankrupts owned the rights and property in and to said writing, Trustee’s No. 1.

“20. That on September 12, 1953, Peters and Timber Incorporated of California were not in full production on gang logs and that the demand made by them on that day was not made in good faith.

“21. That on November 18, 1953, Peters and Timber Incorporated were not ready, willing, nor able to accept log deliveries according to the pro-

visions of the writing, Trustee's No. 1, and the offer or tender made on that date was not made in good faith.

"22. That prior to October 21, 1953, said bankrupts gave proper notice of default to Peters and Timber Incorporated of California and proper notice of intention to exercise election to terminate under the provisions of the writing, Trustee's No. 1.

"23. That, except as here found to the contrary, or herein modified, the allegations contained in Trustee's Petition for Order Disallowing Claim under Section 57(d) of the Bankruptcy Act and for Judgment for Affirmative Relief are true.

"24. That except as herein found expressly to the contrary, all the allegations contained in the claim of S. A. Peters and Timber Incorporated of California, being numbered 50 in the files of this Court, are not true.

"25. That the testimony of S. A. Peters and the various witnesses produced in his behalf and on behalf of Timber Incorporated of California, in all particulars where the same attempted to contradict or was offered in contradiction of the testimony and evidence offered by the Trustee herein, is and was not true."

That each and all of said findings and order were and are erroneous and petitioners are further aggrieved thereby in that:

A. The said Referee in Bankruptcy failed and refused to find the undisputed fact that the said

bankrupts had, long prior to the filing of the petition in Bankruptcy herein, to wit: prior to December 14, 1953, assigned all of said bankrupt's rights in and pursuant to the agreement referred to in the Referee's Finding No. 6 to Snow Camp Logging Company, a California corporation.

B. That said Referee in Bankruptcy failed and refused to find the undisputed fact that although said Trustee in Bankruptcy alleged in his petition for said order to show cause "that the bankrupt partnership, without any consideration whatsoever, assigned its claim against respondents to the corporation, and that owned by the corporation"; the record in the case made by said Trustee contains not one scintilla of evidence, either oral or documentary, to support said allegations and findings.

C. That said Referee failed and refused to find that a dispute over the purchase price of certain of the logs bought by petitioners arose and that thereafter checks for the payment of the amount asserted to be owing by petitioners was proffered to said bankrupts and was accepted by them although each of said payments were conditioned as to their acceptance to be payment in full.

D. That said referee erred in refusing to sustain your petitioners' objection to the summary jurisdiction of the above court in so far as it relates to the trustees so-called "affirmative relief."

E. That said referee erred in refusing to permit the withdrawal of your petitioners' claim.

F. That said referee erred in refusing to grant your petitioners' plea in abatement.

G. That said referee erred in an order restraining and enjoining your Petitioners' attorneys from litigating and/or attempting to litigate any of the issues and matters relating to said claim and the objections thereto in any forum other than the above-entitled court.

Wherefore, your petitioners pray that your Honor Certify to the Judge of this Court and transmit to the Clerk thereof the records in said proceeding having to do with or in any manner bearing upon the orders aforesaid as provided in Section 39 of the Bankruptcy Act.

Dated: March 28, 1958.

S. A. PETERS,
TIMBER INCORPORATED OF
CALIFORNIA,

By /s/ R. K. PETERS,
Vice-President.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed April 2, 1958, Referee.

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO ISSUE
WRITS OF EXECUTION TO AND AU-
THORIZING SHERIFFS OF HUMBOLDT,
MENDOCINO, SISKIYOU AND TRINITY
COUNTIES TO MAKE LEVIES THEREOF

Upon the reading and consideration of the verified Trustee's Petition for Order Directing Clerk to Issue Writs of Execution to and Authorizing Sheriffs of Humboldt, Mendocino, Siskiyou and Trinity Counties to Make Levies Thereof, filed herein this day by Kal W. Lines, the duly appointed, qualified and acting Trustee of the estates of the bankrupts above named; and

It appearing therefrom that a judgment was made and entered herein on March 26, 1958, upon the order, judgment and decree made and entered on March 25, 1958, in the above-entitled proceedings by the Honorable Burton J. Wyman, one of the Referees in Bankruptcy of this Court, in favor of Kal W. Lines, as Trustee of the estate of Snow Camp Logging Company, a co-partnership, one of the bankrupts above named and against S. A. Peters and Timber Incorporated of California, a corporation, in the amount of \$674,627.47; and

It further appearing that more than 10 days have expired since the entry of said judgment and no application for a stay of execution has been made by the said judgment debtors S. A. Peters and Timber

Incorporated of California, a corporation, or either of them; and

It further appearing that there is no Deputy United States Marshal in Humboldt, Mendocino, Siskiyou and Trinity Counties, in the District aforesaid, who can make levies of a writ of execution on the property of said judgment debtors who are alleged to have property in said counties; and it further appearing that it would be to the best interests of the parties herein, the estate of said bankrupt and the creditors thereof that Sheriffs of said Counties be designated and authorized to execute writs of execution to be issued herein, under the applicable provisions of Sections 691 and 692 of the Code of Civil Procedure of the State of California; and there being a proper case for the making of the order following, now therefore,

It Is Hereby Ordered that the Clerk of the above-entitled Court issue writs of execution on the judgment heretofore entered herein on March 26, 1958, in favor of Kal W. Lines as Trustee of the estate of Snow Camp Logging Company, a copartnership, bankrupt, as petitioner and against S. A. Peters and Timber Incorporated of California, a corporation, as respondents and judgment debtors, in the amount of \$674,627.47 and that said writs of execution be directed to the Sheriffs of Humboldt, Mendocino, Siskiyou and Trinity Counties and that levies thereof be made pursuant to the provisions of Sections 691 and 692 of the Code of Civil Procedure

of the State of California and that said Sheriffs make return in accordance with the provisions contained in said writs of execution so authorized and directed to be issued herein by the Clerk of the above-entitled Court.

Dated: April 11th, 1958.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed April 11, 1958, U.S.D.C.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE
RELATIVE TO PETITION FOR REVIEW
FILED IN THE ABOVE-ENTITLED MAT-
TER ON APRIL 2, 1958

To Honorable Sherrill Halbert, Judge of the United
States District Court for the Northern District
of California:

I, Burton J. Wyman, one of the referees in
bankruptcy of the above-entitled court, and the ref-
eree primarily in charge of the above-entitled bank-
ruptcy proceeding, hereby respectfully certify and
report as follows:

This matter now is before the United States Dis-
trict Court for the Northern District of California,

acting as an appellate court,* upon the verified "Petition to Review Referee's Order, Judgment and Decree, Dated March 28, 1958." The Petition for Review reads as follows:

[The Petition for Review has not been reproduced here. It is set forth in full at pages 58 to 65 of this printed record.]

The proceedings leading up to, and which made possible the filing of the aforesaid petition for review, briefly stated is as follows:

1. On January 11, 1956, Timber Incorporated of California and S. A. Peters filed the following "Proof of Claim" in the sum of \$900,000.00:

[The Proof of Claim with attached exhibits has not been reproduced here. It is set forth in full at pages 3 to 30 of this printed record.]

2. On October 3, 1956, Kal W. Lines, as trustee of the estates of the above-named bankrupts, filed the following verified "Trustee's Petition for Order Disallowing Claim Under Section 57(d) of the Bankruptcy Act and for Judgment for Affirmative Relief":

[The Trustee's Petition for Order Disallowing Claim, etc., has not been reproduced here. It is set

*"In passing upon a petition for review of a referee's order 'the proceeding is in substance an appeal from the court of bankruptcy * * * i.e., the referee * * * to the District Court.' In re Pearlman (C.C.A.) 16 F. (2d) 20, 21."

In re Big Blue Min. Co. (D.C., N.D., Calif.) 16 F. Supps. 50, 51.

forth in full at pages 31 to 33 of this printed record.]

3. Based upon the last mentioned petition, an order to cause was signed and issued, fixing November 7, 1956, at 10 a.m. at the courtroom of the undersigned referee in bankruptcy, in San Francisco, as the date, the hour and the place of hearing said last mentioned petitions.

4. On November 1, 1956, S. A. Peters and Timber Incorporated of California, filed their "Special Appearance," objecting to the jurisdiction of the above-entitled court.

5. On November 7, 1956, the above-mentioned objection to jurisdiction, having been overruled, there were filed in the above-entitled bankruptcy proceeding (a) an "Affidavit of G. Edward Goodwin in Support of Motion for Withdrawal of Claim," i.e., the aforesaid "Proof of Claim," filed as aforesaid, (b) a "Motion for Order Authorizing Withdrawal of Claim of S. A. Peters and Timber Incorporated of California," and (c) "Return to Order to Show Cause, Motion to Discharge Order to Show Cause, and Plea in Abatement."

6. The last mentioned motion having been overruled, the matter came on regularly for trial, and was tried, resulting in a decision against said S. A. Peters and Timber Incorporated of California and later the "Findings of Facts and Conclusions of Law," and the "Order, Judgement and Decree" were

filed, the timely filing of the aforesaid petition for review then following, as aforesaid.

Dated: June 17, 1958.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 18, 1958, U.S.D.C.

In the Northern Division of the United States District Court for the Northern District of California.

No. 14388 in Bankruptcy

In the Matter of:

SNOW CAMP LOGGING COMPANY, a Copartnership Composed of CLARENCE VANDER JACK, CLARENCE C. VANDER JACK, and HORACE MECKLEM, JR., and JEANNE V. MECKLEM; CLARENCE VANDER JACK, CLARENCE C. VANDER JACK, and HORACE MECKLEM, JR., and JEANNE V. MECKLEM, Individually,

Bankrupts.

MEMORANDUM AND ORDER

In this proceeding S. A. Peters and Timber Incorporated of California (hereinafter referred to as

petitioners) seek the review of an order of the referee in bankruptcy (Bankruptcy Act § 2(a)(10)) arising out of the administration of the estate of Snow Camp Logging Company, a bankrupt partnership, which said order embodies a joint judgment against petitioners.

Petitioners entered these proceedings by filing proof of an unliquidated claim in which was alleged the breach of a contract for the supply of logs entered into between S. A. Peters (and subsequently assigned to Timber Incorporated of California) and the bankrupt. This was opposed by the trustee, who petitioned the referee for an order disallowing the claim (Bankruptcy Act § 57(d)). In addition, the trustee sought affirmative relief alleging a breach of that same contract on the part of petitioners. The referee issued an order directing petitioners to show cause why the trustee's request for affirmative relief should not be granted.

Before the date set for the hearing on the order to show cause, petitioners appeared specially to object to the jurisdiction of the bankruptcy court on the ground that there was then pending in the Superior Court of the State of California, in and for the County of Humboldt, an action entitled Snow Camp Logging Co., a corporation, plaintiff, vs. S. A. Peters and Timber Incorporated of California, defendants, and that the subject matter of said action was the same as that embodied in the trustee's petition for affirmative relief. This objection was overruled by the referee.

Petitioners then filed a motion for permission to withdraw their claim, again alleging the pendency of the state action, and also alleging that the bankrupt had no interest in the contract as it had been assigned to Snow Camp Logging Company, a corporation, which was not bankrupt. This motion, too, was overruled. Petitioners then made their return to the order to show cause, together with a plea in abatement reiterating their former objections.

The matter came on regularly and was heard by the referee. After a notice of decision and the submission by both parties of suggested findings of fact and conclusions of law, an order, judgment and decree was issued by the referee in which it was ordered that the trustee of the estate of Snow Camp Logging Company, a partnership, have judgment; and that such judgment be entered in his favor and against S. A. Peters and Timber Incorporated of California, in the amount of \$674,627.47.

In their petition for review, petitioners have taken wholesale objection to the factual findings of the referee, as well as his conclusions of law. As most of these objections were not pressed in petitioners' memoranda, they will not be considered in detail except insofar as they impinge upon the larger issues presented (*Humphries Gold Hill Corp. vs. Lewis*, 20 F. 2d 896).

I.

Petitioners first contend that the contract upon which their claim was founded, and upon which the

judgment was based, was not an asset of the bankrupt's estate. This issue was first raised in petitioners' Motion for Withdrawal of claim. In that motion petitioner asserted that it was alleged in the complaint in the state action that Snow Camp Logging Company, a corporation, was the assignee of the contract. In their memoranda here petitioners also point to the trustee's statement (in his petition for an order disallowing the claim) that the contract had been assigned to the corporation without consideration and, therefore, was an asset of the partnership. There is nothing about these statements which required the referee to accept them as determinative of this issue.

A specific finding of the referee on this point (Referee's Findings of Fact No. 19 reads: "That at the time of the filing of the petition in bankruptcy herein said bankrupts owned the rights and property in and to said writing, * * *") is attacked on the ground that there is not one scintilla of evidence, either oral or documentary, to support that determination. This attack is without foundation. The only record before this Court is the transcript of the proceedings had to determine which party breached the contract, and the extent of the damages. The issue of ownership was decided adversely to petitioners before that time. Lacking a coherent statement of facts by either party, it is impossible to determine the exact course of events which surrounded the referee's conclusions that the contract did, in fact, constitute an asset of the bankrupt's

estate. A detailed consideration of the reasoning which might have prompted this conclusion would serve no purpose. It is sufficient to point out that there are a number of possible bases, both procedural (E.g.: issue not properly presented. [Federal Rules of Civil Procedure §§ 25, 12(h) and 19(b)]) and substantive (E.g.: corporate assignee not sufficiently separated from the bankrupt. [In re Gillespie Tire Co., 54 F. Supp. 336]). In any event, such a general attack as that of petitioners is legally insufficient (See: In re Cobra Mfg. Co., 214 F. 2d 489; Gramil Weaving Corp. vs. Raindeer Fabrics, Inc., 185 F. 2d 537; and Humphries Gold Hill Corp. vs. Lewis, *supra*) to challenge the referee's factual determination concerning the result of the alleged assignment (In re Steinberg, 138 F. Supp. 462).

II.

It is further urged by petitioners that the general rules of comity were violated by the referee when he proceeded to hear the issues raised by the claim, and the trustee's motion in opposition thereto. It appears that the action in the state court, between Snow Camp Logging Co., a corporation, and petitioners, had been instituted prior to the adjudication of bankruptcy of the partnership. In that suit petitioners had made answer, coupled with a cross-complaint, and after the appointment of a trustee, the trustee's attorneys had been substituted for those of the corporation. While a trial date had been set, a hearing on the merits had not begun.

The memoranda filed in this proceeding contain elaborate discussions of the principles of comity, but they do not consider the crucial question, viz., whether a breach of comity is reversible error. There is, however, no need to approach that problem as the issue was not properly raised here. The petition for review did not allege error in that respect (Bankruptcy Act § 39(c)), and thus that point cannot be considered by this Court in this proceeding (*In re Moskowitz*, 63 F. Supp. 1000; and *In re Musgrave*, 27 F. Supp. 341).

III.

The petition for review does allege as error the action of the referee in restraining petitioners' attorneys, at the trustee's request, from proceeding in the state action. Petitioners' briefs seem to question not the power of the referee (See: Bankruptcy Act §§ 2(a)(15); 1(9), and 38(6)), but rather the propriety of such action. In support of their position, petitioners rely exclusively on *Brehme vs. Watson*, 67 F. 2d 359. The applicability of that case is not clear. It certainly falls far short of being persuasive authority in this proceeding. In that case a creditor attached the property of one Brehme in an attempt to force Brehme into involuntary bankruptcy. When Brehme sought to contest the attachment in the state court, the creditor appeared before the bankruptcy court, as a petitioning creditor, and obtained a restraining order which enjoined Brehme from defending in the state court the suit upon

which the attachment was based. In reversing the bankruptcy court and dissolving the restraining order, the Court of Appeals for the Ninth Circuit held that "Appellee's [the creditor's] effort through the medium of suits brought by him, to precipitate appellant into bankruptcy and thereafter by restraining order prevent him from presenting his defenses to these suits was an unfair and oppressive use of legal process which should not be permitted." (Brehme vs. Watson, *supra*, at p. 362.)

The only principle of the Brehme case which has any relation to the instant appeal is that such an injunction, issued by a court of bankruptcy, may be directly appealed. This fact points to the rule which is determinative of the issue here. The question of the referee's jurisdiction to grant the restraining order was first raised by this proceeding for a review. No prior review of the order was sought or obtained within the time within which such review might have been taken (Bankruptcy Act § 39(c)). The referee's restraining order is, therefore, conclusive as to petitioners.

IV.

It is further contended by petitioners that the referee was without authority or power to summarily adjudicate the issues raised by their claim, and by the trustee's counterclaim for affirmative relief. It is conceded by the trustee that the bankruptcy court does not have summary jurisdiction

over a controversy respecting property or a chose in action held adversely to the bankrupt estate, without the consent of the adverse claimant (Bankruptcy Act § 23(a), and *City and County of Denver vs. Warner*, 169 F. 2d 508). The precise question here, however, is whether petitioners' entry into the bankruptcy proceedings, through the filing of a claim, constituted such requisite consent and thereby empowered the bankruptcy court to not only summarily deny the claim, but also to summarily consider the counterclaim based on the same contract (See: General Order in Bankruptcy No. 37, and Federal Rules of Civil Procedure 13(a)), and grant affirmative relief thereon.

Petitioners cite several recent cases from the Fifth Circuit for the proposition that the presentation of a claim does not constitute consent to the summary jurisdiction of the bankruptcy court where timely objection (*In re Gross*, 121 F. Supp. 38) to such summary jurisdiction has been made. An analysis of the two cases most strongly relied upon indicates that their ratio decidendi does not encompass such a general statement. While seemingly supporting petitioners' statement of the rule, examination of the factual situations involved in these two cases (*B. F. Avery & Sons Co. vs. Davis*, 192 F. 2d 255, cert. den. 342 U. S. 945; and *In re Tommie's Dine & Dance*, 102 F. Supp. 627) shows that they were concerned with an adverse claimant who also filed a claim against the estate. The adverse

claimant held property which the trustee alleged was received in a preferential transaction, while the claim was founded upon an entirely separate and distinct transaction, which is not the situation presented on the instant appeal.

While the broad rule urged by petitioners has been followed by some courts (*In re Houston Seed Co.*, 122 F. Supp. 340. And see: *Duda vs. Sterling Mfg. Co.*, Chap. X proceeding, 178 F. 2d 428, 14 A.L.R. 2d 899, but c.f.: *In re Eakin*, 154 F. 2d 717), there has been no real unanimity among the reported decisions (Compare: *In re Solar Mfg. Corp.*, 102 F. Supp. 259. aff. 200 F. 2d 327, cert. den., sub nom. *Marine Midland Trust Co. vs. McGirt*, 345 U. S. 940).

When first confronted with the problem of implied consent to the summary jurisdiction of the bankruptcy court, as affected by a trustee's attempt to assert a counterclaim, two positions were taken. Some courts held that the claimant consented to a summary adjudication of the counterclaim, but not in an amount exceeding the claim (*Metz vs. Knobel*, 21 F. 2d 317; *In re Florsheim*, 24 F. Supp. 991; and *Fitch vs. Richardson*, 147 Fed. 197). This view was founded on the premise that such a defensive summary jurisdiction was a necessary incident to the court's power to determine allowability (Bankruptcy Act § 57(g) and § 2(a)), and *Pepper vs. Litton*, 308 U. S. 295) and to set off claims with counterclaims (Bankruptcy Act § 68(a)), especially

where the counterclaim was based on an alleged preference (Bankruptcy Act § 60).

The fundamental difficulty with this procedure was that the question of a preference having been adjudicated, that issue was *res judicata*, as were the facts, and thus binding in the plenary action which then had to be brought by the trustee in an appropriate forum to recover any amount of the preference in excess of the claim (*Giffin vs. Vought*, 175 F. 2d 186).

As this required a trustee to split a cause of action, other courts rejected this procedure and held that since a counterclaim, such as an alleged preference, was a valid defense which the trustee might interpose to a claim, and the bankruptcy court had jurisdiction to summarily adjudicate the counterclaim up to the amount of the claim, it was unreasonable to require the trustee to seek out the creditor in order to recover the remainder. Appreciating that an insistence upon an independent action, where the facts had been conclusively settled in the insolvency proceeding, did no more than raise a formal obstacle to the collection of an amount already found owing, these courts held that the proper course was for the referee to hold the claim in abeyance until the preference issue had been determined in a plenary suit (*In re Continental Producing Co.* 261 Fed. 627).

After *Alexander vs. Hillman*, 296 U. S. 222, which sustained the equitable jurisdiction of a receiver

over counterclaims for portions of the receivership res adversely held by those who had filed claims to a part of the estate, that decision was extended by analogy to include a claim and counterclaim based on a legal contract, for a sum certain. Thus extended, it was held that the filing of an unsecured claim, in itself, amounts to consent to the summary determination of a set off and, if the striking of balances warrants, the award of a judgment against the claimant and in favor of the trustee (*Florance vs. Kresge*, 93 F. 2d 784). This holding was premised on the argument that once the equitable jurisdiction of the court had been voluntarily invoked by the presentation of a claim, the court was empowered to decide all matters in dispute and decree complete relief. For, where the claim and counterclaim arose out of the same transaction (*Daniel vs. Guaranty Trust Co. of New York*, 285 U. S. 154) once the jurisdiction of the court had been invoked, the petitioner risks “* * * all of the disadvantages which may flow to him as a consequence as well as gaining all of the benefits.” (See: *Case vs. Los Angeles Lumber Co.*, 308 U. S. 106, at p. 127; see also: *Floro Realty & Inv. Co. vs. Steem Elec. Corp.*, 128 F. 2d 338; and *Inter-State National Bank of Kansas City vs. Luthur*, 221 F. 2d 382).

The original view in this circuit seemingly was one of opposition to implied consent (*In re Continental Producing Co.*, *supra*; *In re Bowers*, 33 F. Supp. 965; and see: *In re Patterson-MacDonald Shipbuilding Co.*, 284 Fed. 281; and *In re Florsheim*,

supra), but this no longer is the law. While the Court of Appeals has not spoken directly on the matter, it has stated in a similar situation that the effect of *Alexander vs. Hillman*, supra, in conjunction with *Williams vs. Austrian*, 331 U. S. 642, is to make such implied consent an additional ground for jurisdiction (*Coffman vs. Cobra Mfg. Co.*, 214 F. 2d 489). It now seems well settled in this circuit that where the counterclaim is based on an alleged preference, arising out of the same transaction as the claim, the presentation of the claim constitutes consent to the summary jurisdiction of the bankruptcy court, and the court has the power to give judgment for the trustee to the extent that the counterclaim exceeds the claim (*In re Nathan*, 98 F. Supp. 686; see also: *Mercury Engineering*, 60 F. Supp. 786; and *In re Germain* 144 F. Supp. 678).

In other circuits, it has been held that the bankruptcy court has the power, where a claim is submitted, to grant an award in favor of the trustee on an unliquidated counterclaim for breach of warranty (*Columbia Foundry Co. vs. Lochner*, 179 F. 2d 630, 14 A.L.R. 2d 1350) as well as for a sum certain (*Florance vs. Kresge*, supra) based on a legal contract. To refuse to allow the bankruptcy court to do this would require the trustee to split a cause of action (See: *Conway vs. Union Bank of Switzerland*, 204 F. 2d 603), and to allow withdrawal of the claim would violate the principle embodied in Federal Rules of Civil Procedure § 41(a)(2). (See: *In re Nathan*, supra.)

Petitioners here submitted to the trustee an unliquidated claim based on an alleged breach of contract by the bankrupt partnership. The trustee's counterclaim alleged a breach of that same contract, but on the part of petitioners. The referee exercised his discretion and chose to retain the claim (Bankruptcy Act § 57(d)). The referee proceeded to summarily adjudicate the issues and reached the final determination that petitioners were indebted to the estate of the bankrupt.

Even assuming that the position taken by petitioners represents the law in the Fifth Circuit, this Court must respectfully disagree with the learned judges of that Circuit. In the view of this Court, such a rule lacks the practicality that all rules of law ought to enjoy, and in addition, it fails to consider the impact of *Alexander vs. Hillman*, *supra*, and *Williams vs. Austrian*, *supra*, on the problem of implied consent to summary jurisdiction in such situations as the one presented here. It is the considered opinion of this Court that the submission of the claim by petitioners constituted consent to the jurisdiction of the bankruptcy court as to any and all counterclaims arising out of the same transaction on which the submitted claim is based. This being the case, the referee had the power and authority to hear and adjudicate the unliquidated claim, together with the counterclaim of petitioners and the trustee and, having determined that the contract was breached solely by petitioners, compute and award damages to the trustee.

As to petitioners' contention that they were denied their right to a trial by jury, it need only be said that petitioners themselves chose the forum in which to litigate the issues when they filed their claim with the referee in this proceeding. A court of bankruptcy is a court of equity (*Bookey vs. King*, 236 F. 2d 871), and in equity there is no right to trial by jury (*United States vs. Louisiana*, 339 U. S. 699; *Shields vs. Thomas*, 18 How. 253; *Barton vs. Barbour*, 104 U. S. 126; *Luria vs. United States*, 231 U. S. 9; and *Baker vs. Mueller*, 222 F. 2d 180). Petitioners' position with reference to their claim of a right to a trial with a jury, not unlike several other claims now made by them, leaves the Court with the feeling that they "want to have their cake and eat it too." This they cannot do.

V.

The final exceptions taken by petitioners are to certain findings of fact made by the referee. In view of the referee's Findings of Fact Nos. 24 and 25 (that none of the allegations of the claim were true; and that the testimony of petitioners offered to contradict that of the trustee was not true) such attacks must fail. The referee in his capacity as trier of the facts chose to believe the evidence adduced by the trustee. The semantic quibbling of petitioners' in their attempt to question the sufficiency of the evidence upon which said findings were based is not worthy of discussion (*Federal Rules of Civil Procedure* § 52(a), and *Costello vs. Fazio*, 256 F. 2d 903).

It Is, Therefore, Ordered that the Order, Judgment and Decree of March 25, 1958, entered by the referee in this proceeding, the review of which is sought by petitioner, be, and the same is, hereby approved and confirmed.

It Is Further Ordered that the order of this Court, heretofore made, dated March 26, 1958, be, and the same is, hereby reaffirmed and approved.

Dated: October 30, 1958.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed October 30, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Kal W. Lines, Trustee in Bankruptcy herein,
and to Max H. Margolis and Frederick L.
Hilger, his attorneys:

Notice is hereby given that S. A. Peters and Timber Incorporated of California, a corporation, petitioners on review herein, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain memorandum and order dated October 30, 1958, confirming an order of

referee in bankruptcy Burton J. Wyman, Esq.,
dated March 25th, 1958.

Dated: November 18, 1958.

L. W. WRIXON,
CHARLES M. STARK,
PAUL W. McCOMISH,
HUBER & GOODWIN,

By /s/ CHARLES M. STARK,
Attorneys for S. A. Peters and Timber Incorporated
of California, a Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 19, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO
DOCKET APPEAL

It Is Hereby Ordered that the time within which to
docket the appeal herein in the United States Court
of Appeals for the Ninth Circuit be and the same
is hereby extended to and including the 29th day
of January, 1959.

December 29th, 1958.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed December 29, 1958.

In the Northern District of the United States District Court for the Northern District of California

No. 14388

In the Matter of

SNOW CAMP LOGGING COMPANY, a Co-partnership Composed of CLARENCE VANDER JACK, CLARENCE C. VANDER JACK and HORACE MECKLEM, JR., and JEANNE V. MECKLEM; CLARENCE VANDER JACK, CLARENCE C. VANDER JACK and HORACE MECKLEM, JR., and JEANNE V. MECKLEM, Individually,

Bankrupts.

Before: Honorable Burton J. Wyman,
Referee in Bankruptcy.

ORDER TO SHOW CAUSE

Wednesday, November 7, 1956—10:00 A.M.

Appearances:

For the Trustee:

MAX H. MARGOLIS, ESQ., and
FREDERICK L. HILGER, ESQ.

For Respondents, S. A. Peters and Timber,
Inc.:

CHARLES M. STARK, ESQ.,
PAUL W. McCOMISH, ESQ.,
L. W. WRIXON, ESQ. and
MESSRS. HUBER & GOODWIN, by
E. EDMUND GOODWIN, ESQ.

The Referee: Matter of Snow Camp Logging Company.

Mr. Wrixon: Ready for S. A. Peters and Timber, Inc.

Mr. Hilger: Ready.

Mr. Wrixon: For the record, may I state the appearances? On behalf of Mr. Peters and Timber, Inc., Charles M. Stark and his associate Paul W. McComish, G. Edmund Goodwin, of Eureka, and myself, L. W. Wrixon.

Mr. Goodwin: If your Honor please, may I reserve the opening statement until Mr. Hilger has completed his case?

The Referee: Surely.

Mr. Goodwin: Thank you.

Mr. Hilger: At this time we would like to call Mr. Clarence Vander Jack.

CLARENCE C. VANDER JACK,
called as a witness for the Trustee. Sworn.

The Referee: Your name is Clarence Vander Jack?

A. Clarence C.

Direct Examination

By Mr. Hilger:

Q. Mr. Vander Jack, where do you now reside?

A. 37 Upper Drive, Oswego, Oregon.

Q. Now, in June of 1951, where did you reside?

A. In Humboldt County. I believe Bayside Heights near Arcata.

Q. At that time were you engaged in any busi-

(Testimony of Clarence C. Vander Jack.)

ness? A. The business of logging.

Q. And where were your operations in that business? [2*]

A. In Humboldt County in the area known as Redwood Creek; also some of the Snow Creek area.

Q. Were you engaged in that business as an individual or as a partner? A. As a partner.

Q. And the name of your partnership?

A. Snow Camp Logging Company.

Q. Who were the other partners at that time?

A. My father, my sister, and my brother-in-law.

Q. What is your father's name?

A. Clarence.

Q. Your sister? A. Ruth Jeanne Mecklem.

Mr. Stark: Your brother-in-law?

A. Horace Mecklem.

Q. (By Mr. Hilger): Now, in connection with your logging business in June of 1951, did you have any business transactions with S. A. Peters?

A. Yes, we entered into an agreement.

Q. Was that an agreement in writing?

A. It was.

Q. Was that executed by your business, the Snow Camp Logging Company, and by Mr. Peters?

A. It was.

Q. I hand you a document with a blue cover, entitled "Agreement," bearing date the 1st day of June, 1951, consisting of four pages, purporting to bear the signatures of S. A. Peters and Clarence C.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

(Testimony of Clarence C. Vander Jack.)

Vander Jack and Clarence Vander Jack. Can you identify that document? [3]

A. That is the agreement between Mr. Peters and ourselves, Snow Camp Logging Company.

Q. That was executed by the people whose names appear on the last page thereof?

A. That is correct.

Mr. Hilger: I will offer this as the Trustee's first, your Honor.

The Referee: Trustee's Exhibit 1.

(The Agreement referred to was admitted in evidence as Trustee's Exhibit No. 1.)

Q. (By Mr. Hilger): Mr. Vander Jack, what were the facts and circumstances surrounding the execution of this agreement to which I just referred? A. We had——

Mr. Stark: I object to that question on the ground that the agreement itself is the best evidence.

The Referee: What about it?

Mr. Hilger: The Code specifically provides that the facts and circumstances surrounding the execution of the instrument can be offered in evidence.

Mr. Stark: Only if it is ambiguous.

Mr. Hilger: The terms of the agreement provide for the supplying of requirements, and I believe it to be primary contract law that we have to find out what took place to establish the contemplated requirements thereunder.

The Referee: Isn't there a provision in the law

(Testimony of Clarence C. Vander Jack.)

that [4] whatever happens before is all incorporated in the agreement?

Mr. Hilger: I am not asking what happened before, your Honor. I am asking for the facts and circumstances surrounding the execution of it.

The Referee: That is before. If it is not executed, it is before the execution.

Mr. Hilger: Well, we have here a contract that calls for requirements.

The Referee: Point out where you think you have any right to introduce oral testimony.

Mr. Hilger: All right, sir. Paragraph 3 thereof provides:

“That sellers agree to furnish and buyer agrees to purchase all the logs required by buyer in the operation of any or all of his mills in the Redwood Creek Ranch area.”

The Referee: What is your question here?

Mr. Hilger: The facts and circumstances surrounding the execution of this document calling for requirements. In order for a requirements contract to have any meaning, there must be a contemplation, there must be in existence requirements the nature and extent of which requirements has to be ascertained in gauging the performance required thereunder. The specific Code section number I don't have, but your Honor is familiar with it.

The Referee: You say under Subdivision 3 or Paragraph 3? [5]

Mr. Hilger: That is correct.

(Testimony of Clarence C. Vander Jack.)

The Referee: "The sellers agree to furnish and buyer agrees to purchase all the logs required by buyer in the operation of any or all of his mills in the Redwood Creek Ranch area."

Mr. Hilger: And the extent of those requirements is only to be ascertained by the contemplation of the parties at the time of the execution. What the factual situation was regarding the mill requirements, the capacity of the buyer, what was to be expected of the seller by way of supplying the same? Those are matters that are properly established, in a contract of this sort, by what was said at and about the time of the execution of the contract.

Mr. Stark: I submit, your Honor, he can show what he did under the terms of the contract. He cannot show the facts and circumstances as referred to them prior to the execution, because, as I say, they are embodied in the terms of the contract before you. What he did under it is another thing.

The Referee: I think you are bound by your contract. The objection is sustained.

Mr. Hilger: All right. I will offer to prove that at the time this contract was signed, Mr. Peters represented and it was the basis upon which the contract was entered into, that requirements in excess of 30 to 36 million feet of logs would be required, and that as soon as the second mill that is referred to in a recital here was completed, his requirements [6] would approach 60 million feet, and those would be the requirements that the sellers

(Testimony of Clarence C. Vander Jack.)

could be expected to fulfil and that it was upon that basis that the sellers entered into the contract and purchased equipment to establish their capacity.

The Referee: I will ask you: Are you claiming that the contract was fraudulently entered into?

Mr. Hilger: No, your Honor. We are merely trying to set up the standard of performance by both sides under the general term "requirements." In other words, was it contemplated that a million feet a year be delivered, or was it contemplated that 60 million feet be delivered? In gauging whether or not either side or both sides performed the agreement, the amount is necessary, what was expected of each party is the only connection with that. We do not contend that the contract was fraudulently entered into. We merely wish to introduce evidence surrounding the execution.

Mr. Stark: I submit he has made his offer of proof, your Honor.

The Referee: Yes. The offer of proof is denied.

Mr. Hilger: All right.

Q. Immediately after the execution of this document, Trustee's Exhibit No. 1, what, if anything, was done in connection therewith?

A. Mr. Peters proceeded to build his mill.

Q. What type of a mill? A. A Gang mill.

Q. Where was that constructed? [7]

A. Down on the Redwood Creek Ranch.

Q. Was that adjacent to or near your timber in the area? A. It was adjacent to it, yes.

Q. When was that placed in operation?

(Testimony of Clarence C. Vander Jack.)

A. Somewhere in May of 1952, I think. Somewhere in there.

Q. At no time was any other mill ever constructed by Mr. Peters in that area?

A. Not to my knowledge.

Q. Did you ever have any discussions with Mr. Peters regarding the second mill?

A. We had several.

Q. When did the first take place, if you recall?

A. Of course, that was at the inception of the contract and thereafter at various times.

Q. Do you recall the first such discussion regarding the second mill?

Mr. Stark: We are entitled to know who was present.

Mr. Hilger: I am merely laying the foundation.

Q. Do you recall when the discussion took place, without going into what the discussion was?

A. The first discussion, as I say, was at the inception of the discussion of the contract itself.

Q. And thereafter?

A. I would say from time to time.

Q. Were there numerous such discussions?

A. There were. [8]

Q. Do you recall any one specifically without going into what was said, at this time?

A. I could not give you a specific time.

Q. Well, can you give me an approximate time?

A. Well, I would say approximately January, 1952, there was a discussion.

Q. Where was that discussion?

(Testimony of Clarence C. Vander Jack.)

A. Well, during the construction of the mill and on the mill property.

Q. Near the mill property? A. Yes.

Q. Who was present at that discussion?

A. Oh, myself and Mr. Peters and possibly my father and his son might have been present at that time.

Q. You mean Mr. Peters' son? A. Yes.

Q. And what was said at that discussion?

A. Well, they said they were going to proceed with a larger circular mill to cut larger logs. Possibly thereafter, if feasible, they would go into a veneer operation.

Q. That would be in addition to the Gang mill?

A. That is correct.

Q. Was anything said at that conversation regarding the log supply that would be required for the operation?

A. Mr. Peters expected when he came into full production in all the mills, expected 200 to 250,000 feet of logs a day on a one-shift basis.

Q. Approximately how many feet a month would that be? [9]

A. Between five and six million board feet a month.

Q. What was said regarding when that additional capacity would be completed?

Mr. Stark: Just a minute, please. We think that counsel should not put words in the witness' mouth, or lead him. Obviously, he is adverse to us. Let him say what happened, who said it, and when.

(Testimony of Clarence C. Vander Jack.)

The Referee: All right.

Q. (By Mr. Hilger): What, if anything, further was said?

A. Well, during the various conversations between ourselves and Mr. Peters, Mr. Peters felt he would proceed first upon his circular mill in conjunction with his Gang mill and expected to put that in production sometime in 1953, in the spring thereof.

Q. The spring of 1953? A. That is correct.

Q. Now, then, did Mr. Peters ever complete the construction of the additional capacity?

A. Never to my knowledge; he never did, no.

Q. What, if anything, did you do in connection with this proposed additional capacity?

A. Well, we proceeded on a road-building program. To get our capacity up further, we had to purchase additional equipment and hire additional operators.

Q. What additional equipment did you buy, Mr. Vander Jack? A. In 19—

Mr. Stark: Just a moment, if your Honor please. I [10] submit that what he did in connection with fulfilling the terms of his contract is immaterial, whether he bought a fleet of trucks or not. They are not asking us to pay for the equipment they did or did not buy, I don't think.

Mr. Hilger: Their complaint is that we did not perform. I am showing the manner and means by which we did perform. I think what they did in con-

(Testimony of Clarence C. Vander Jack.)

nection with the contract is material unless the claimant is prepared to stipulate that we in all respects performed.

The Referee: What about that, Mr. Stark?

Mr. Stark: Obviously, we are not prepared to stipulate to any such foolishness as that.

The Referee: The objection is overruled.

Q. (By Mr. Hilger:) What, if anything, did you do in connection with the proposed capacity you were to supply?

A. We went ahead and hired Gyppos, purchased three new Cats——

Q. What kind? A. DT24.

Q. What did the DT 24s cost?

A. At that time they cost \$31,000 apiece.

Q. You purchased three? A. Correct.

Q. What further did you do by way of preparing to meet the supply?

A. Proceeded on a road construction program.

Q. Where did you build the road from or to?

A. We proceeded to line our roads so they were finally through his mill. We started a nearby road toward Highway 99 [11] that we could bring logs off of at a later date. That road had to be abandoned after awhile. We also purchased equipment and so on, additional trucks.

Q. How many additional trucks did you purchase, Mr. Vander Jack?

A. In 1953 we purchased—in 1952, five additional trucks.

Q. What type and kind?

(Testimony of Clarence C. Vander Jack.)

A. Both were Internationals, six-wheelers. In 1953 we purchased approximately 12 GMC trucks.

Q. What did the International trucks cost?

A. They cost around \$17,000 a unit.

Q. You purchased five of those? A. Right.

Q. What did the GMC's cost?

A. Around \$20,000 a unit.

Q. And how many GMCs did you buy?

A. Twelve.

Q. Did you pay cash for those or on conditional sales?

A. They were bought on conditional sales.

Q. You paid them out by month?

A. That is correct.

Q. You also bought the Cats on conditional sale, I presume? A. That is right.

Q. Now, how much did you put into this road construction program?

Mr. Goodwin: I object to that as entirely immaterial, what they spent on building roads and their own timber.

Mr. Hilger: It shows the scope of the preparation to comply with the obligation to supply the requirements as he indicated Mr. Peters told him those requirements would be. [12]

The Referee: Is there anything in the contract as to that?

Mr. Hilger: There is a statement in there that specifically obligates him to supply the requirements. The testimony is those requirements were

(Testimony of Clarence C. Vander Jack.)

outlined to be from five to six million feet of logs per month.

The Referee: Yes, but that came after the signing of the contract, did it not?

Mr. Hilger: It came as part of the performance of the contract, your Honor, and the claimant has placed performance in issue. We offer to prove that we spent sizable sums not only on additional equipment, but upon roads and in connection with our obligation to supply the requirements.

Mr. Goodwin: We submit, your Honor, that what he did, what money he spent, has nothing to do with delivery of logs or the performance of what he undertakes to do under the contract. We submit Mr. Hilger is trying to vary the terms of a written agreement by parol evidence.

Mr. Hilger: We are merely trying to show the extent to which we went in performing our obligation under the contract, because I am sure you are willing to concede that we did in fact perform. I want to show that we not only delivered logs, but we were prepared to deliver such additional logs as Mr. Peters indicated he required. It was in connection with the extent of this performance that I made the additional offer of proof of what was done for the execution of the contract. [13]

Mr. Margolis: Does your Honor have the claim here filed by the claimant? It may shed some light on it.

Mr. Goodwin: If your Honor please, I thought Mr. Hilger's question was not directed to what Mr.

(Testimony of Clarence C. Vander Jack.)

Vander Jack did do to perform the written contract. The question was directed to what he did to perform only the verbal contract, not included.

The Referee: What about that, Mr. Hilger?

Mr. Hilger: No, your Honor.

The Referee: Aren't you bound by this contract absolutely?

Mr. Hilger: I contend we certainly are. I contend that under and pursuant to the terms of the contract, we were obligated to supply the requirements. The witness testified Mr. Peters told him: "Now, Mr. Vander Jack, your obligation to perform by the spring of 1953 will be five to six million feet of logs per month." At that juncture it became incumbent, under the terms of this contract, on Mr. Vander Jack to deliver five or six million feet of logs per month. If I am obliged to fill all the requirements and my other party tells me my requirements will be six million feet, in order to perform my obligation, I have to ready myself to deliver that six million feet.

The Referee: Where have you got it in the contract here, six million or six hundred, or anything?

Mr. Hilger: Well, going back to the original offer of proof, your Honor, in order to interpret the performance of this contract, we must know what was required.

The Referee: I think the Court is bound by this contract. [14]

Mr. Hilger: To get at it another way: How can the Court ascertain whether there has been per-

(Testimony of Clarence C. Vander Jack.)

formance of the delivery of the requirements by the Bankrupts unless the Court has some information as to what those requirements were?

The Referee: Where is anything said about the requirements here?

Mr. Hilger: In No. 3, your Honor.

The Referee: "That sellers agree to furnish and buyer agrees to purchase all the logs required by buyer in the operation of any or all of his mills in the Redwood Creek Ranch area."

Mr. Hilger: That is correct. They agree and obligate themselves to furnish the requirements of the buyer in the operation of his mills.

Mr. Goodwin: I submit, your Honor, he can testify how many logs he did deliver and that would be entirely proper. How much money he spent on roads, on some verbal understanding, I again submit is entirely improper.

The Referee: I think you are correct. I think that is apart from this contract. Counsel is right. Show how many logs were delivered and when you reached the point, if that be the case, where you could not deliver some. I think you have the right to testify to that.

Mr. Hilger: Put it this way then. I withdraw the last question and ask:

Q. When did you begin delivering logs to Peters' mill [15] pursuant to this agreement?

A. I believe sometime in May, 1951, or 1952.

Q. Thereafter did you continue to deliver logs to that mill up until October 21, 1953?

(Testimony of Clarence C. Vander Jack.)

A. We did.

Q. To your knowledge, was there any time when there were insufficient logs at the mill for it to operate?

A. No, there was not.

Q. Did Mr. Peters or any one on his behalf ever complain to you, prior to October 21, 1953, that he had insufficient logs?

A. No.

Mr. Stark: Does the Court want a five minute recess?

The Referee: Yes, take a ten minute recess.

(Recess.)

The Referee: Proceed.

Q. (By Mr. Hilger): Were you ever, prior to October 21, 1953, informed by Mr. Peters, or any one on his behalf, that this Gang mill was in full operation?

A. I think we had a letter covering that from Mr. Peters.

Q. Do you remember when that was?

A. Possibly September of 1953.

Q. Had you been making deliveries to this mill during the summer of 1953?

A. We had.

Q. Do you recall what volume of logs had been delivered to that mill, that Peters mill, during the months of May, June, [16] July, August and September of 1953?

A. Ten million seven hundred thousand.

Mr. Goodwin: Pardon me; what was that period?

Mr. Hilger: From May 1 to September 23, 1953.

(Testimony of Clarence C. Vander Jack.)

The Witness: About ten million seven hundred thousand.

Q. (By Mr. Hilger): During the summer of 1953, did you have an opportunity to observe the condition of the log pond to which you were delivering logs to the Peters mill? A. I did.

Q. Would you describe the condition there during that time?

A. Well, our heavy production started in May and toward the latter part of May we began to get confusion in the log pond. We had several, during the summer there were several times the dump itself became plugged. There could be no further deliveries into the pond for periods of two or three days.

Q. How long did that condition persist?

A. Up until the end of September.

The Referee: 1953? A. Of 1953.

Q. (By Mr. Hilger): Did it persist up until the time you ceased delivering logs there on October 21?

A. I would say not quite until then. There was a period of about two weeks until the end of the operation which Mr. Peters had that the pond was clear.

Q. Mr. Vander Jack, I am going to hand you a photograph. Without going into what it shows, do you recognize that photograph? [17]

A. I do.

Q. Do you know when it was taken?

A. I think sometime in August or September of 1953.

(Testimony of Clarence C. Vander Jack.)

Q. And where was it taken?

A. At Mr. Peters' mill.

Q. Do you know who took it?

A. Charley Heckard, my truck boss.

Q. Was it taken under your direction?

A. It was.

Q. Were you present when it was taken?

A. I was.

Q. And of what is that a picture?

A. It is a picture showing the dump and the pond.

Q. At Peters' mill?

A. At Peters' mill, and trucks going in to be dumped.

Q. Whose trucks are those?

A. It is hard to tell from here; probably mine; some of what you call Gyppo trucks, contractors.

Q. Are those your logs?

A. My logs, Snow Camp Company's logs.

Q. Directing your attention to the next portion of the picture where there is an A frame starting up in the air here, is that the location of the log dump?

A. That is.

Q. And what is the large pile right in front of the dump?

A. That is a jackpot in front of the dump.

Q. What is a jackpot?

A. That is where logs are not cleared away from the front of the dump and pile on top and you cannot dump any further. [18]

(Testimony of Clarence C. Vander Jack.)

Q. Referring to the area all around that jackpot there at the dump, is that open water in the pond?

A. That is open water.

Q. Does this picture accurately and fairly represent the condition and appearance at the time it was taken?

A. It does.

Mr. Hilger: I offer it as the next in order.

The Referee: Trustee's No. 2.

(The photograph referred to was admitted in evidence as Trustee's Exhibit No. 2.)

Q. (By Mr. Hilger): Mr. Vander Jack, I show you another picture. Without going in to what it depicts, do you recognize that picture?

A. I do.

Q. Was that picture taken under the same circumstances and conditions as the picture that has just been offered and received in evidence?

A. It was.

Q. Does that picture show the log dump at Peters' pond?

A. It does.

Q. And what is that in front of the log dump?

A. That is the jackpot in front of the dump.

Q. Are those your logs loaded on the trucks shown in the picture?

A. They are.

Q. Does that picture accurately and fairly present the [19] condition and appearance of that area at the time it was taken?

A. It does.

Mr. Hilger: I will offer this as the Trustee's next.

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: Is that a duplicate of the other picture?

Mr. Hilger: No.

The Referee: Apparently not.

Mr. Hilger: No, it is not a duplication.

The Referee: Trustee's No. 3.

(The photograph referred to was admitted in evidence as Trustee's Exhibit No. 3.)

Q. (By Mr. Hilger): Did the dump condition as reflected in the two pictures to which you just, or at which you just looked, have any effect upon your operation in supplying logs to the dump?

A. Well, of course it did. The trucks were held up.

Q. What was that effect, Mr. Vander Jack?

A. Well, the trucks were held up. We did not have the use out of the trucks. It eliminated the use of their hauling ability. That in turn was reflected in the books in logs received on loading and unloading operations in the woods. It affected the whole procedure.

Mr. Goodwin: If the Court please, I move to strike the answer on the ground that it is the witness' opinion and conclusion. Again, we are getting into something not embraced within the written contract. There is nothing in the contract about the dump plugged or unplugged, who is to keep [20] it open or who is not. The contract is entirely silent on the method and manner of delivering logs. Again I think we are going afield from the written contract.

(Testimony of Clarence C. Vander Jack.)

The Referee: The objection may be overruled.

Q. (By Mr. Hilger): Were the delays to which you just referred frequent? A. They were.

Q. Over what period of time were your trucks delayed? I will phrase that differently. Were the delays long in duration? A. They were.

Q. How long were your trucks delayed in connection with this operation?

A. Oftentimes it takes two or three days to get the dump cleared up so we could dump logs again.

Q. Were any of your trucks delayed for periods of two or three days in dumping?

A. They were.

Q. What result did that have? Would the truck be able to be used in another operation?

A. No. The load would be on it. Therefore, it could not be used. Those logs were brought in on a private road and the loads were heavier than allowed on the highway. We could not haul the logs to them. So the truck itself was just held up.

Q. How did you pay the drivers of those trucks?

Mr. Stark: Objected to as incompetent, irrelevant and immaterial. [21]

Mr. Hilger: Well——

Mr. Stark: It is the same as the building of the road.

Mr. Hilger: I will make this observation, your Honor: We would offer to prove that the drivers were paid on a salary. The fact that they had to sit there two days without doing anything constituted

(Testimony of Clarence C. Vander Jack.)

an element of damage in the performance of this contract. That is the purpose of the question.

Mr. Stark: Did they stay there to grade the logs?

Mr. Hilger: We will get into what they did.

Mr. Stark: It had nothing to do with the contract. What he paid the drivers, what he paid for gas or oil or trucks, or what it cost to build the road.

The Referee: I think you have a different situation here. If the trucks were held up as a result of somebody not doing something or somebody doing something that they were obligated to do under the contract——

Mr. Stark: That they were obligated to do under the contract. The contract is silent on the subject.

The Referee: I don't know if you are obligated to as yet. If I enter into a contract with you to do something and it is not defined beyond what is known in the trade or in the business and you do something to prevent my carrying out my part of the contract, then that enters into it, absolutely. I think you were right on the road building, but here is something directly connected with this contract, in other words, the delivery of logs. [22]

Mr. Stark: They could not have trucked the logs in if the road was not built. So, the theory is the same, Judge.

The Referee: No, it is not. The road was built in order to get the stuff out of there, the logs out of there. That would have to be built regardless of whether he had a contract or not.

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: I told Mr. Peters that one of my first jobs was with a logging firm in Southern Louisiana. I never would have built a road into the place unless I had a contract.

Mr. Hilger: That is our argument that the Court rejected. If the creditor wishes to accept it, I will go back into the road building.

Mr. Stark: It is not serious; let him go ahead.

The Referee: The objection is overruled.

Q. (By Mr. Hilger): Would you answer the question? A. Will you restate it?

Q. I will repeat the question. How and in what manner did you compensate the drivers of these trucks that were delayed?

A. We paid a minimum——

Mr. Stark: That is not the question. How and in what manner?

A. We compensated them by an hourly salary plus a bonus over a certain amount of logs hauled per day.

Q. (By Mr. Hilger): Who dumped the logs at Peters' plant? A. He employed a dump man.

Q. Who did? A. Mr. Peters. [23]

Q. The dump is part of the sawmill, is it not?

A. It is.

Q. Do you have any control over the operation of the dump? A. I do not.

Q. At Peters' mill? A. I did not.

Q. Or any other mill where you dumped logs?

A. I never did.

Q. How long have you been delivering logs to

(Testimony of Clarence C. Vander Jack.)

sawmills? A. Since about 1938.

Q. And during that time have you ever encountered a situation where any one other than the saw-mill owner and operator controls the dump?

A. I never have unless it is a commercial dump. There are commercial dumps.

Q. Was Peters' a commercial dump?

A. It was not.

Q. All the logs delivered were used at the Peters' mill? A. That is correct.

Q. Whose employee was the dump man?

A. Timber Inc.'s.

Q. He was the person on the premises whose duty it was to maintain the pond and keep the dump clear?

A. He had been employed for that purpose.

Q. By S. A. Peters? A. Timber, Inc.

Q. You just referred to times at which the dump became plugged. Did you or any one on your behalf make a request of Peters that it be cleared up? [24]

A. I made a direct request to Peters and I made a direct request to the mill foreman and his general manager at times that the situation be cleared up, yes.

Q. What was the result of those requests at any time?

A. They were sympathetic to them and said they would straighten them up.

Q. Did they?

A. They did in due course of time.

Q. Did they take any immediate action on them?

(Testimony of Clarence C. Vander Jack.)

A. On some occasions, no. On other occasions, yes.

Q. Now, you have stated that the delays at the dump had an effect on our logging operation in the woods. What effect was that?

A. It would have an effect upon the production in the woods. First of all, you did not have the required transportation when the trucks were held up. That in turn caused logs to be brought into the landing and decked and finally plugged the landing in the woods, and you did not get the use out of your crew that you would normally have got.

Q. Did any of your landings in the woods become plugged as a result of this log transportation?

A. They did. We had several landings where we had to move on and leave the logs stacked there until a later date, which all required extra handling and extra cost.

Q. Did that result to which you just testified increase your logging and delivery costs to any extent?

A. It definitely increased our delivery cost and our logging [25] cost, too.

Q. By what amount were those costs increased?

Mr. Stark: Just a minute.

Mr. Hilger: Let me finish the question.

Mr. Stark: Don't answer.

Q. (By Mr. Hilger): By what amount in dollars were the costs of logging and deliveries increased by the delays at the log dump at Peters' mill?

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: Your Honor, I object to the question for the reason that it is not based on the evidence. There is no foundation laid, it calls for the opinion and conclusion of the witness. The records are the best evidence.

The Referee: Is this something that would show up in a record?

Mr. Stark: I don't know. He has not exhausted that field, though.

The Referee: What I am thinking about is this: If there was a delay, it would not show anything. He would be paying them what the record would show.

Mr. Stark: By comparison, your Honor, if they were doing violence to his rights by jamming the pond—he calls it plugging it; I think the word is jam—that did not begin when he started making the deliveries. He can show what it cost in the beginning as against what it cost to make deliveries when he says he could not dump into the pond.

Mr. Hilger: If your Honor please, logging costs will [26] vary by seasons. What it costs to deliver logs in February is not necessarily the same as in May, given the same delivery conditions. I believe, as your Honor has indicated, there is no place on the books or records that would show. There is no place on the books and records that would show the cost attributable to delays. That can only come from the knowledge of one specified operation. He had an interest in it and had a chance to estimate its effect upon his business. After all, this witness has

(Testimony of Clarence C. Vander Jack.)

testified he was one of the owners of this business and he can testify as to the value of any item he owns or that affects his ownership and that must, of course, be his opinion, and if counsel wants to go into the matter on cross-examination, and inquire into the basis on which the witness formed his estimation of the cost, certainly that would be proper cross-examination and would go to the credibility of the determination of the amount, but not the admissibility when he is testifying as to his own operation.

Mr. Stark: He was the operator. He cannot guess money out of our pocket. If he has records, he should produce them as the best evidence.

Mr. Hilger: They will not reflect the amount, your Honor.

Mr. Stark: I submit, if your Honor please, that I have been an operator and I have been a contractor. The procedure of any sawmill would tie this in the cost delivered to the pond of every stick of lumber ever delivered there.

Mr. Hilger: This is not a sawmill. It is a [27] logging operation.

Mr. Stark: Well, part of the production.

Mr. Hilger: It might be different areas, different terrain.

The Referee: But, we are talking of this particular terrain.

Mr. Hilger: I am talking about terrain in one place as compared to the terrain 100 yards away. That would make a difference.

(Testimony of Clarence C. Vander Jack.)

The Referee: Somewhere along the line there must be some figures on this. They must be put down somewhere.

Mr. Hilger: The actual costs were put down.

The Referee: Let's get those.

Mr. Hilger: I have not offered them. I don't intend to, because they can only show how much in fact it cost to deliver these logs. They have no bearing on whether that is excessive or the reason for the excessiveness.

The Referee: We can determine how often or how long the pond was jammed or plugged, whichever you want to call it; show what it cost them for delivering without that from the books, or it should.

Mr. Stark: Your Honor, in all the years I have been practicing before you, you have never permitted slipshod evidence to come in because of the inconvenience of producing the proper kind.

The Referee: I am not going to do it this time either. [28] The objection is sustained on that particular question.

Q. (By Mr. Hilger): How much per hour did you pay your truck drivers?

A. On the basis of \$2 an hour with a percentage over a certain amount of footage hauled.

Q. And how much did you pay the members of your woods crew per hour?

A. Various prices for various jobs.

The Referee: What were you paying for this particular job?

A. That is what I am telling. The jack setter

(Testimony of Clarence C. Vander Jack.)

got \$2 an hour; the cat skinner was paid \$2.75 an hour at that time; the head loader about the same; and the crane operator about \$3 an hour. That would pretty well cover it.

The Referee: Did they work on a bonus?

A. No; they worked on a straight hours basis.

Q. (By Mr. Hilger): The jack setter got \$2 an hour?

A. At that time.

Q. Your cat skimmers? A. \$2.75.

Q. What was the other crewman there?

A. A crane operator. He got about \$3 an hour.

Q. And I think you said the truck driver——

A. Got \$2 plus a bonus.

Q. Now, were there other members of your standard operation?

A. There was a hump tender. He got \$2.75 an hour. The [29] head racker got about \$2.25. That would pretty well cover the field of the working operation. That would cover it including the crew.

Q. Everything except falling?

A. Everything except falling and bucking. That was done by contracts.

Q. That comes to \$14.75 per hour?

A. That is about right.

Mr. Goodwin: I beg pardon?

Mr. Hilger: \$14.75.

The Witness: You are not talking about the amount of men involved?

Q. (By Mr. Hilger): Talking of one crew.

A. One crew would consist of more than that. I am just giving the various jobs.

(Testimony of Clarence C. Vander Jack.)

Q. What would a crew consist of?

A. We would have three jacksetters and a head racker.

Q. Three jacksetters and one head racker.

A. One crane operator, two loaders.

Q. What does the loader get?

A. The head loader gets \$2.75; the second loader at that time got about \$2.25.

Q. One catskinner?

A. Two catskinners, and there would be a chaser \$2 an hour, and a crane operator.

Q. How many hump tenders would there be?

A. One [30]

Q. That makes a total of——

Mr. Stark: Just a minute, please. Ask him a question; don't make a statement.

Mr. Hilger: It is mathematical.

Q. That would constitute the hourly cost. The total then of those compensations would compute the hourly cost of the operation of a woods crew together with the truck drivers.

Mr. Stark: I object on the ground that that is not the testimony of the witness. With the exception of the crane operator and the catskinner, every figure he gave was about so and so. If every one is about, if we in turn paid him, that takes money out of our pocket under his theory. Counsel is not entitled to compute those abouts and come up with a figure. The record speaks for itself.

Mr. Hilger: I will perhaps clarify the matter for counsel.

(Testimony of Clarence C. Vander Jack.)

Q. Were the figures you testified the amounts you paid those job holders at that time?

A. They were.

Q. And the totals as outlined, the crew, would constitute the hourly cost of maintaining that crew at that time? A. They would.

Q. Now, the mathematical addition of that would come to \$28.50 per hour.

You have testified as to delays in unloading your trucks at various times during the summer of 1953. How many hours [31] were those trucks delayed during that period that you testified to, May through October?

Mr. Stark: May I ask a question on voir dire?

The Referee: Surely.

Examination Under Voir Dire

By Mr. Stark:

Q. Didn't you keep any records?

A. We kept a very fine set of records.

Mr. Stark: I object to the question on the ground that it is not the best evidence.

Direct Examination (Resumed)

Mr. Hilger: The records will not show how many hours at a time they spent, only the total time. If this witness observed the operation, he can tell how many there were.

Mr. Stark: We have not seen the records.

(Testimony of Clarence C. Vander Jack.)

Mr. Hilger: They are immaterial.

Mr. Stark: He says he kept a fine set of records. We are entitled to see them.

The Referee: I know. It would not show there on hours.

Mr. Stark: It would in this manner, by the deduction from the actual working hours.

The Referee: I do not see how.

Mr. Stark: If I have a truck that is able to operate eight hours on a particular day and only operates four hours, then, assume it is four.

Mr. Hilger: How would the record show it?

The Referee: The record would not show that. The record [32] would show how much was hauled, yes, and the record would show how much was paid to the men at that time.

Mr. Stark: And the number of hours he worked.

Mr. Hilger: The number of hours for which he was paid.

The Referee: What he was paid, regardless of whether he worked or not. That is the trouble.

Mr. Stark: Even so, he just got through telling you he kept a very fine set of records. We have not seen them or had an opportunity to see them.

The Referee: Your objection goes to the particular question. It is overruled on this particular question. Read the question.

(Question read by the reporter as follows:
“You just testified to delays in unloading your trucks at various times during the summer of

(Testimony of Clarence C. Vander Jack.)

1953. How many hours were those trucks delayed during the period that you testified to, May through October?")

A. That is a hard question to answer. There were a great many trucks involved here, we had as many as 40 trucks including our own hauling. However, our own truck arrivals were approximately 70 per cent effective over the whole given period. If you go over our records, we kept an hourly check of when a truck sat or was in operation or just what. If the records were examined you can get the number of hours.

Mr. Hilger: What is your observation?

A. My observation is that it was about 70 per cent effective. [33]

Q. In hours?

A. In hours over the whole time. There were times when they were not effective at all.

The Referee: He is asking you how many hours?

Q. (By Mr. Hilger): 70 per cent effective you mean to say with how many trucks operated?

A. We had Gyppo trucks. We had as many as 40 trucks. For me to carry in my mind that figure would be impossible.

Mr. Stark: Just a minute, please. That is the point I am making.

The Referee: If he has a record of it, it should be produced.

The Witness: It would show our trucks. It would not show the Gyppos.

(Testimony of Clarence C. Vander Jack.)

The Referee: It would show what?

A. It would show our trucks. We kept an hourly record on each truck.

Mr. Stark: He said he cannot answer categorically truthfully.

The Referee: His last answer entitles you to have the record. He says now that each of the trucks are in it.

The Witness: That is correct.

Mr. Stark: Can the answer be stricken on that basis, if your Honor please?

The Referee: What has he really answered?

Mr. Hilger: He said his trucks were 70 per cent effective during that period of time. [34]

Q. Does that mean they were operating 70 per cent of the time? A. That is what it means.

Q. And delayed 30 per cent?

A. Approximately 30 per cent over the whole period.

The Referee: I will ask you this: Did you object to that question?

Mr. Stark: Yes, sir.

The Referee: That particular question?

Mr. Stark: Yes, sir.

Mr. Hilger: I would like the record gone into on that.

The Referee: If he objected, the answer will be stricken. If he did not, it won't.

Mr. Stark: I objected and moved to strike at the same time.

The Referee: We will see. Read it back.

(Record read by the reporter.)

Mr. Hilger: It is 12:00 o'clock.

The Referee: We will adjourn until 2:00 o'clock.

(Continued to 2:00 p.m.) [35]

Afternoon Session

Same appearances.

Mr. Hilger: At this time, your Honor, I would like to call the claimant out of order as an adverse witness.

Mr. Goodwin: Are you through with Mr. Vander Jack?

Mr. Hilger: No, but I would like to call him out of order to establish certain facts. That is under Section 21j as an adverse witness.

S. A. PETERS

called under Section 21j of the Bankruptcy Act.
Sworn.

The Referee: What is your full name, Mr. Peters?

A. S. A. Peters, S. A.

The Referee: Proceed.

Direct Examination

By Mr. Hilger:

Q. Where do you reside?

A. Bayside Heights just out of Arcata, California.

Q. In Humboldt County, California?

(Testimony of S. A. Peters.)

A. It is in Humboldt County, California.

Q. What is your business or occupation, Mr. Peters?

A. Sawmilling, lumber.

Q. How long have you been engaged in that?

A. Approximately 15 years.

Q. You were so engaged in June of 1951?

A. I was.

Q. I will show you Trustee's Exhibit No. 1, a contract or agreement between yourself and Snow Camp Logging Company. That is your signature on the last page thereof? [36]

A. Yes.

Q. Now, you have since assigned your rights under the contract to a corporation known as Timber, Inc.?

A. That is correct.

Q. When did you make that assignment?

A. Just about the time that we incorporated.

Q. When would that be?

A. That was in the latter part of July or the first of August, 1951.

Q. Now, in connection with the performance of this contract which you just identified here, Mr. Peters, did you have a discussion with Mr. Vander Jack and Snow Camp Logging Company, a discussion regarding your intention to manufacture and install at your millsite a circular mill?

Mr. Stark: Just a minute, Mr. Peters. Don't answer.

The Referee: Are you through?

Mr. Hilger: I am through.

Q. Did you have such a discussion?

(Testimony of S. A. Peters.)

The Referee: There is an objection you are going to make?

Mr. Stark: I would like to know the time, place, and persons present.

Q. (By Mr. Hilger): Without going into what the discussion was, did you have a discussion with him? Then we will get to the time and place.

A. Yes; I did. [37]

Q. All right. After the execution of this contract, and again without going into what was said, when was the first such discussion that you recall?

A. Probably along March or April of 1953.

Q. That was the first occasion at which your installation of a circular mill was discussed?

A. That is right. We had a hard enough time getting the other mill in operation.

Q. That was April, you say, of 1953?

A. 1953.

Q. Where did that discussion take place?

A. It would be hard to say. It might have been at the mill; it might have been downtown.

Q. Do you recall who was present other than yourself and Mr. Vander Jack?

A. There would have been nobody but myself and Mr. Vander Jack that I know of.

Q. At that time you told him you were having constructed in Oregon a circular mill for installation at these premises, did you not?

A. We were having one constructed.

Q. You so told Mr. Vander Jack?

A. I probably did. I think it was a little later

(Testimony of S. A. Peters.)

than April. I think it was in May. My record would disclose exactly what date it was.

Q. And at that discussion you also indicated that the mill then under construction in Oregon would, you thought, be installed [38] and in operation during the summer or the late summer of 1953?

A. That was our intention, yes.

Q. And you so told Mr. Vander Jack?

A. I don't know that I told him exactly when it was going to be ready, because we were having a tough time getting parts, but we would have it installed as soon as it was ready.

Q. You indicated it would be in production, you thought, by the fall of 1953?

A. That is right.

Q. And you indicated to him the approximate capacity and log requirements for the operation of that mill, did you not?

A. No; I would not say I did, because I did not know what it was going to produce.

Q. I want your best recollection of what you told Mr. Vander Jack was your idea as to the capacity.

A. I figured it would be somewhere around 30 to 35,000.

Q. Per shift? A. Yes.

Q. You were operating during the summer of 1953 two shifts most of the time? A. Yes.

Q. In a week or two it went to three shifts, and that with the Gang mill alone? A. Correct.

Q. The circular mill would have been additional

(Testimony of S. A. Peters.)

capacity? A. That is right. [39]

Q. Now, did you not, at that discussion, indicate your intention of putting a veneer mill in addition to the circular mill? A. I did not.

Q. When did you mention that to Mr. Vander Jack?

Mr. Stark: Your Honor, I am listening as carefully as I can to these questions. I really cannot fathom the materiality of them as concerns this contract. This contract was to deliver logs to a Gang mill, nothing to do with delivery to a circular mill; certainly nothing relative to delivery to a veneer mill.

The Referee: Is anything said in the contract?

Mr. Hilger: It appears in the contract as a recital.

Mr. Wrixon: Only a recital.

Mr. Stark: It is highly possible that if he states what he wishes to prove, I will stipulate to it.

The Referee: It is in the contract as part of a recital.

Mr. Stark: That it is the intention to build another mill?

The Referee: No; second, a circular mill, and, third, a veneer mill.

Mr. Stark: All right.

Q. (By Mr. Hilger): What was the requirement for your Gang mill on a two-shift operation?

A. Oh, 125, maybe 130,000.

Q. Per day? A. Per day. [40]

Q. It is a fact, is it not, that you were cutting

(Testimony of S. A. Peters.)

approximately three million feet per month during the entire summer of 1953?

A. No; I don't think we cut quite that much.

Q. Would that be approximately correct?

A. It might be approximate.

Q. The capacity of the circular mill on a two-shift basis would have been 60,000 to 70,000 feet additional. Is that right?

A. It was not our plan to run two shifts.

Q. What were you going to do, run one a day?

A. One shift.

Q. There would have been additional, on that basis, approximately 1,800,000 feet per month?

A. There would have been on that basis, a month.

Q. Now, your veneer mill, what capacity was that to be?

A. That, we never got into, due to the fact that there were not enough peelers on the property to justify a veneer mill.

Q. Didn't you tell Mr. Vander Jack you were arranging for one? A. I did not.

Q. You did tell him in the spring of 1953 that at that time you had under construction a circular mill in Oregon?

A. That is right, because I did have.

Q. And you thought it would be delivered in the fall of that year, and you at that time asked Mr. Vander Jack to deliver during the summer of 1953 a cold deck so those mills would have logs to operate during the winter? [41]

(Testimony of S. A. Peters.)

A. We attempted to arrange finances for a cold deck and were turned down.

Q. I ask you if you did not request——

A. Mr. Vander Jack was informed of that.

Q. This was April, 1953, we are now talking about?

The Referee: May.

Q. (By Mr. Hilger): Now, when the conference took place, if it did not at that time, did you tell Mr. Vander Jack that the operation of those two mills in the winter forthcoming, that would be the winter of 1953 and 1954, did you not tell him you would require a cold deck for the operation of the mills during the winter?

A. I told him we would attempt to finance a cold deck.

Q. You told him also you would require him to put in one? A. I did not.

Mr. Stark: Pardon. Is a cold deck an accumulation of logs for the purpose of operating the mill otherwise not operable in winter weather?

Mr. Hilger: Yes.

Q. Going back to the subject at hand, you discussed the price with Mr. Vander Jack at which the logs to that cold deck would be delivered, did you not?

A. For the ones that we could finance, yes.

Q. You even wrote Mr. Vander Jack a letter concerning it, did you not?

A. I don't recall whether I did or not. [42]

(Testimony of S. A. Peters.)

Q. Setting forth the terms of a discussion that you had with Mr. Vander Jack?

Mr. Stark: If you have such a letter, show it to him.

Mr. Hilger: I will conduct my case, counsel.

Mr. Stark: You won't ask about a letter without showing it to him, if I have anything to do with it.

Mr. Hilger: I am asking if he wrote such a letter.

The Witness: I do not know whether I did or not.

Q. (By Mr. Hilger): Is it not a fact that on July 13, 1953, you had a conference with Mr. Vander Jack?

A. I don't remember whether I did or not.

Q. You cannot recall?

A. I had several conferences, but I could not tell the date I had them.

Q. Do you recall a conference on July 13, 1953, at which, or do you recall stating that all cold-deck logs would be at the rate of \$36 per thousand rather than the regular delivery price, in view of the handling difference?

A. I would not know whether I wrote the letter or not. I would have to see it.

Q. I am not asking if you did write the letter. I am asking, did you have such a conference and talk in which you stated——

Mr. Stark: Tell him if you remember, Mr. Peters.

A. I don't remember whether I did or not.

(Testimony of S. A. Peters.)

Mr. Stark: I am going to make him show them to you in a minute. [43]

Q. (By Mr. Hilger): Now, then, what cold-deck financing did you discuss with Mr. Vander Jack?

A. We discussed cold decking as many logs as we could get finances for, and got turned down.

Q. How many did you tell him you were seeking finances for?

A. At the time, I think I asked the bank to finance logs to cold deck approximately ten million feet.

Q. When was that?

A. The spring of 1953.

Q. You told Mr. Vander Jack you were seeking financing for that amount of cold-deck logs for the winter of 1953?

A. I told him I was trying to get finances.

Q. You indicated the reason you wanted that was they would be required for the operation of these two mills in the winter of 1953?

A. The winter of 1953 and the spring of 1954.

Q. Is that correct?

A. That is what I wanted the logs for, yes.

Q. Now, then, beginning with July or August of 1953, you began the practice of recomputing the invoices sent to you by Snow Camp Logging Company for these logs, did you not?

A. That is right. Maybe that is the letter you refer to.

Q. I will let you know when I refer to a letter.

(Testimony of S. A. Peters.)

Do you recall how much you revised or corrected the invoice?

A. I think it was \$2, back to \$34.

Q. \$2 per thousand feet? A. \$2, yes.

Q. Thereafter and in August, you made further adjustments to [44] the invoices that were sent you by Snow Camp Logging Company, did you not?

A. That is right.

Q. Do you recall what those further reductions were? A. They were all \$2, I believe.

Q. What was the condition of the market for logs from July 1, 1953, compared to September of 1953? Do you recall?

Mr. Stark: Just a minute. Will you read that question?

(Question read by the reporter.)

Mr. Stark: Objected to on the ground that it calls for the conclusion of the witness. No foundation has been laid that he knows anything about the market for logs.

Mr. Hilger: I will apologize, counsel.

Q. Did you know anything about the market price of logs in the area at that time?

A. Yes, I did.

Q. All right. Would you then tell me from your knowledge what the market for logs was in July of 1953?

A. I cannot tell you offhand approximately what it was now. Probably around \$36 to \$38 for No. 2 saw logs.

(Testimony of S. A. Peters.)

Q. Then, for the same type logs in September and October, 1953, what would the price be?

A. Read that again, please.

(Question read by the reporter.)

Mr. Stark: That is for No. 2 logs, counsel?

The Witness: For No. 2 logs? [45]

Q. (By Mr. Hilger): The same type of logs that you were quoting the price on a minute ago.

A. About \$34, \$32 to \$34 for No. 2s.

Q. In other words, in your opinion it was \$6 lower in October than it was in July? I believe you stated about \$38 in July.

A. The logs did drop off. The market went down. The lumber market went down, the price of logs went down.

Q. All right. You stated that you adjusted these invoices sent to you by Snow Camp Logging Company at the rate of \$2 per thousand downward in each case from their price?

A. I don't recall whether he billed us at \$38 or billed us at \$36. Whatever I took off was agreed upon between Mr. Vander Jack and myself at the time. That is the reason I wrote the letter confirming it to him.

Q. That was in writing?

A. Yes, I wrote him two or three letters.

Q. Did he write you any letters agreeing to it?

A. I don't recall whether he did or not, but he agreed to it.

Q. I am asking you if there was any statement

(Testimony of S. A. Peters.)

in writing from Mr. Vander Jack or any one in his organization concerning these prices?

A. That, I cannot say. I don't know whether he wrote me a letter or not. I doubt very much that he did.

Q. I am going to show you a letter, a copy of a letter rather, from Snow Camp Logging Company addressed to Timber, Inc., [46] attention Mr. Peters, dated August 10, 1953, and ask you if you did not receive the original of that?

A. Yes, I received the original of that letter.

Q. Is this the letter that you relied upon to establish the agreement as you have said for the reduction in log price?

A. No, we established that verbally.

Q. Then, it was not in writing?

A. I confirmed it in writing.

Q. There was no agreement in writing, however? A. No.

Q. Subsequent to the initial adjustment that was made on the Snow Camp Logging Company's invoices, you made adjustments on others, or subsequent invoices after the first ones. Is that correct?

A. After when?

Q. I believe you stated that the first invoice of Snow Camp Logging Company on which you made an adjustment was for logs delivered from July 16 to July 31. Now, were invoices received from Snow Camp Logging Company for logs delivered subsequent to that date? A. That is right.

(Testimony of S. A. Peters.)

Q. That is 1953. Did you make adjustments to those? A. I did.

Q. Do you recall at what rate the adjustment was made?

A. It was reduced to \$34. That was the price we agreed upon.

Q. Who agreed upon?

A. Mr. Vander Jack and myself. [47]

Q. How, in writing? A. No, verbally.

Q. All of the reductions were to \$34 from beginning to end? A. No, just that period.

Q. Well, July 15 to October?

A. That is right.

Q. Why did you make this reduction?

A. We agreed upon it.

Q. Who agreed upon it?

A. Mr. Vander Jack and myself.

Q. In writing?

A. No, I told you not. It was verbal.

Q. And you received this letter dated August 10?

A. I received that, yes.

Q. You received it on or about the time it bears date, when this transaction was moving forward?

A. I presume I did.

Mr. Stark: What is the date of the letter?

Mr. Hilger: August 10. Do you have the original in your file?

Mr. Goodwin: I don't know, Mr. Hilger. I will look and see.

Q. (By Mr. Hilger): I will show you, Mr. Peters, a recap, referring only to the items above

(Testimony of S. A. Peters.)

"Miscellaneous" here, leaving this out for the moment. Below "Miscellaneous" would that recap be an accurate tabulation of the logs delivered by Snow Camp Logging Company during the period July, August and September as indicated?

Mr. Stark: Just a second, Mr. Peters. Is the question confined to the footage as distinguished from price? [48]

Q. (By Mr. Hilger): That is the footage?

A. I don't know. It could be approximately correct.

Q. It would be at least approximately correct?

A. Yes.

Q. And it was to those footages that you applied your correction? A. That is correct.

Q. Directing your attention to the columns "Per billing" and "Amount Paid," would those two items be correct?

A. Well, I presume they are, without looking at my own records.

Q. Would you say they were correct?

A. I won't confirm it now, but I assume they are.

Q. All above the amount paid is listed under July as \$36; under August \$35.

A. That is right.

Q. September is \$34. I think you testified the agreement was those were all to be paid for at the rate of \$34, this verbal agreement you alluded to. Is it a correct statement that you came to that verbal agreement at \$34 throughout that period?

(Testimony of S. A. Peters.)

A. I was under the impression that is what it was. I could be mistaken.

Q. You don't really recall what the agreement was? A. Yes, I do.

Q. Well, what was it?

A. Well, do you want me to refer to my [49] letters?

Q. I just want to know if you recall. You have alluded to a verbal agreement. I want to know just what you contend that verbal agreement was, what your recollection is?

A. If this is what I paid on, this is what was agreed on.

Q. You don't recall what was agreed on?

A. That is it.

Q. What is it? A. The price that we paid.

Q. What was your agreement?

Mr. Goodwin: Your Honor, I am going to object to the repetitious asking of the same question. It has been asked and answered several times.

The Referee: And, answered differently.

Mr. Goodwin: That is correct, Your Honor, but he has testified that his recollection was \$34. But, in any event, whatever he paid, he said the amounts had been agreed upon.

The Referee: Counsel wants to know what that was.

Mr. Hilger: I want to know what the witness' independent recollection was of the agreement, if any there was.

The Referee: The objection is overruled.

(Testimony of S. A. Peters.)

A. I don't say that is what it was. That was agreed upon, the figure in here.

Q. (By Mr. Hilger): What was the agreement?

A. \$36 for the last half of July; \$35 for August, and \$34 from then on.

Q. Now, I am going to show you a letter dated September 14, [50] 1953, rather, a copy of a letter from Snow Camp Logging Company to S. A. Peters and ask you to read that.

A. I think we received that letter, or this letter, a copy of it.

Mr. Hilger: In order to preserve the record, I am going to ask that the letter dated August 10, to which the witness has referred, be marked at this time; and the letter dated September 14, to which the witness just referred, consisting of two pages, be marked for identification.

Mr. Stark: Which letter of August 10?

Mr. Hilger: The one the witness identified as having been received by him.

The Referee: The copy of the letter.

Mr. Stark: Is that the document, Your Honor, that in the second paragraph refers to the Red Robin Cafe?

The Referee: The second paragraph?

Mr. Stark: Yes.

The Referee: I don't see anything about that.

Mr. Hilger: That is a letter from Mr. Vander Jack to Mr. Peters.

Mr. Stark: The one I am talking about is from Mr. Peters to Snow Camp Logging Company.

(Testimony of S. A. Peters.)

The Referee: That is the other letter dated September 14. That will be Trustee's B for identification.

(Letter of August 10, 1953, Trustee's Exhibit A for Iden.)

(The letter dated September 14, 1953, was marked Trustee's Exhibit B for identification.)

Q. (By Mr. Hilger): I am going to show you a letter on the letterhead of Timber, Inc., of California.

Mr. Stark: May I see it, counsel?

Mr. Hilger: I think you had it before.

Q. Dated August 10. Did you send that letter out? A. I did.

Q. I will show you a letter dated September 10, 1953, on the letterhead of Timber, Inc., of California.

Mr. Goodwin: May we see that, counsel?

Mr. Hilger: I am sorry. I thought you had a copy.

Mr. Stark: We have no objection to the introduction of that letter.

Q. (By Mr. Hilger): I am directing your attention to the letter of August 10, 1953, from you to Snow Camp Logging Company, not the letter which we have introduced into evidence.

Mr. Stark: I don't understand that letter being in evidence.

Mr. Hilger: The one marked for identification.

Mr. Stark: That is the one you had in your

(Testimony of S. A. Peters.)

hand a minute ago, I believe, Judge.

Mr. Hilger: At this time I will offer in evidence these two exhibits, unless counsel for the other side wish to substitute the originals.

Mr. Goodwin: I don't think I have them, as I told you, Mr. Hilger.

Mr. Hilger: This witness has testified he received them. [52]

The Referee: No objection? Trustee's Exhibit A will become Trustee's Exhibit No. 4 in evidence.

(The document heretofore marked Trustee's Exhibit A for identification was received in evidence as Trustee's Exhibit No. 4.)

The Referee: Trustee's B for identification will become Trustee's 5 in evidence.

(The document heretofore marked Trustee's Exhibit B for identification was received in evidence as Trustee's Exhibit No. 5.)

Mr. Stark: Is there a question pending?

Mr. Hilger: Not yet.

The Referee: Go ahead.

Q. (By Mr. Hilger): Now, looking at your letter dated August 10 to Snow Camp Logging Company, you, in that letter in the first paragraph, indicate the intention of paying \$36 for deliveries during the last half of July.

A. That is what it says.

Q. You indicate in the second paragraph the intention of paying \$35 for deliveries during the first

(Testimony of S. A. Peters.)

of August. Is that correct? A. Yes.

Q. Now, there is nothing in that letter about paying \$34 for deliveries after the middle of August, is there?

A. No. You will find another letter.

Q. I think you testified, however, that your agreement back [53] in July was for \$36 in July, \$35 in August, and \$34 thereafter. Didn't you so testify?

A. Well, I don't recall just when we did start the \$34, but it must have been in August.

Q. There is no reference to any agreement made to that effect in the letter dated August 10 directed to Snow Camp Logging Company, is there?

A. Well, there is another letter besides that.

Q. There is no reference in that letter, is there?

Mr. Stark: Counsel, the letter speaks for itself. The Referee can read. Why don't you offer it in evidence?

Mr. Hilger: I just asked him to read his letter and asked if there is any reference in there to the \$34.

The Witness: No, there is not.

Q. (By Mr. Hilger): Now, by this letter, did you intend to set forth what your understanding of this conference was in July?

Mr. Goodwin: Objected to as calling for the opinion and conclusion of the witness.

Mr. Hilger: He can certainly testify what his intention was.

The Referee: Doesn't the letter speak for itself?

(Testimony of S. A. Peters.)

Mr. Goodwin: The letter speaks for itself.

Mr. Hilger: The letter contains certain factual information. I just want to know if it was the intention of this witness that this letter constituted his version. [54]

The Referee: It calls for his opinion and conclusion of what the letter contains.

Mr. Stark: Your Honor can read; you can draw your own conclusion of what it says.

Mr. Hilger: I know you fellows would like me to offer this, but I am not going to.

Mr. Stark: We can introduce it.

Mr. Hilger: Are you going to?

Mr. Stark: When the time comes, we will, and we will have some shocking information for you.

Q. (By Mr. Hilger): I show you a letter dated September 10, 1953.

The Referee: Is that September 10 or 14?

Mr. Hilger: September 10, from Timber, Inc., to Snow Camp Logging Company, not the one in evidence.

The Witness: Yes, I read it.

Q. (By Mr. Hilger): Directing your attention to the third paragraph there, you allege and state in that that you are computing payment on a formula involving grading of logs.

A. That is what it calls for.

Q. There was nothing in any previous correspondence referring to that formula, was there?

A. No, there was not.

Q. Referring again to this tabulation as to foot-

(Testimony of S. A. Peters.)

ages delivered between July 16 and September 30, it would appear there were approximately 5,136,000 feet of logs delivered in that period of time.

A. That is what the letter says.

Q. That would be approximately correct, would it not, compared to the production of your mill?

A. I would say it was.

Q. You assume it would be?

A. I assume it would be, yes.

Q. You made an adjustment of \$2 per thousand or \$3 per thousand on all those deliveries during that period, revising the invoices downward from those received?

A. It starts with \$2, I think, and then three. Then we get down here to one and three.

Q. The difference between the Snow Camp Logging Company's billing price and the amount you paid was \$12,861?

A. I don't know what the figures say.

Q. Would that be approximately correct from your own knowledge of the operation?

A. I don't know. I cannot tell without looking at my own records.

Mr. Stark: Mr. Hilger, do I understand correctly? Is it your contention on behalf of the Trustee that the reduction in price, whatever price it might be or whenever it occurred, was unauthorized, first, and was not acceptable to your predecessor in interest, Snow Camp Logging Company?

Mr. Hilger: We make the contention that it

(Testimony of S. A. Peters.)

was an outright departure from the contract, unauthorized by any one.

Mr. Stark: Unacceptable to you? [56]

Mr. Hilger: Unacceptable to us at the time, and that is our contention in introducing it.

Mr. Stark: I just want to get that firmly in my mind.

Q. (By Mr. Hilger): Now, you signed checks to Snow Camp Logging Company, covering the log payments as you had computed them, did you not?

A. That is right.

Q. Did you ever send checks to them, make payments to them, beyond your computation as you had reduced it?

A. Only what we agreed upon.

Q. To get at it again: You reduced by \$2 per thousand or more the invoices for logs sent to you by Snow Camp Logging Company during the period of July and thereafter through October. Is that correct?

A. No, I think according to your own figures there was just a dollar off a couple of times. I would have to look at my own records to tell you exactly what we did.

Q. In any event, you did reduce them to some extent?

A. That is right; we did.

Q. And you sent checks in the amounts as you computed them during that period?

A. That is right.

Q. And you have never made any payments beyond those payments as you computed it?

(Testimony of S. A. Peters.)

A. That is correct.

Q. Your computations and payments were less than the invoices [57] received from Snow Camp Logging Company during that period of time?

A. They are.

Q. Now, you have stated that the reason you reduced these prices was because of some agreement. Is that correct? A. Right.

Q. I assume from that then, it was not because of any analysis on your part of the Arcata market?

Mr. Stark: Oh, he has testified it was pursuant to an agreement between himself and Snow Camp.

Mr. Hilger: I want a definite statement of whether he did or did not refer to the Arcata market in computing the revision.

Mr. Stark: We will let him answer without objection.

The Referee: Go ahead; answer.

The Witness: Yes, we referred to the Arcata market. You want to remember, there was gradings done then, 2s and 3s.

Q. (By Mr. Hilger): Did you make revisions pursuant to the alleged agreement or did you make them by reference to the Arcata market?

A. That was the basis on which we made it.

Q. What was? A. The Arcata price.

Q. Then, it was not pursuant to an agreement?

A. Yes, it was. We agreed upon the amount it was going to be reduced. We were buying logs ranch run.

(Testimony of S. A. Peters.)

Mr. Stark: Would you explain that to His Honor? [58]

A. In that kind of log, it can be any type of log. It can be a 3, it can be a 2, or better.

The Referee: Just run of the mill?

The Witness: That is right. But we were getting such terrific volumes of No. 3 and culls, we had to reduce the price.

Q. (By Mr. Hilger): What was the reason, because of the poor market, poor logs, or the agreement with Mr. Vander Jack? What was the reason?

Mr. Stark: I submit, your Honor, he said there were three reasons: the fact that he was not getting as run-of-the-mill quality of log that he was entitled to; the fact that the Arcata market was less than the \$34 price; and the fact that he agreed with Snow Camp as to the reduction.

Mr. Hilger: He has testified at first that it was pursuant to some agreement that was in writing; then, he changed it now that it was verbal.

Mr. Goodwin: No, he did not.

Mr. Hilger: Then, I asked if he did it pursuant to agreement or reference to the Arcata market and he said pursuant to the Arcata market and by agreement. Then, because of the poor quality of logs being received. I think we are entitled to know if there was any definite basis or reason for his reduction or an arbitrary departure from the terms of the written contract.

The Referee: Isn't that for the Court to determine from [59] the testimony as given, which he

(Testimony of S. A. Peters.)

has given, as Mr. Stark says, in three different ways? Whether the three different ways was the reason or not, wasn't that the method?

Mr. Stark: The three different reasons culminated in the agreement, we said.

Mr. Hilger: Under the contract, I believe the Court here is bound to determine only one method. I wish to determine whether that method existed and if not, if that was a departure and breach of the contract.

The Referee: If that is your contention here, are you being hurt any by what was said already?

Mr. Hilger: We will pass it.

Mr. Stark: There is such a thing as an oral modification of a written contract.

Q. (By Mr. Hilger): Mr. Peters, did you hire a dump man at your mill?

A. We always had a dump man, several of them.

Q. Was it his duty to dump the logs when the truck delivered them?

A. That is right.

Q. Did you hire a pond man?

A. Yes, we had several on the ponds.

Q. Was it his duty to keep the pond in operating condition? Is that right?

A. That is right. The dump man helped right along with it when he had time. [60]

Q. And was it the pond man's duty to so distribute logs in that pond that the dump was kept clear? Is that right?

A. That is their object, yes.

Q. The scaling of logs brought in there was,

(Testimony of S. A. Peters.)

up until October, done by one Merle Montgomery. Do you recall that?

A. Yes. Montgomery scaled all the logs that came in there.

Q. Was that by agreement between you and Mr. Vander Jack at that time? A. It was.

Q. And on or about October 20, 1953, a chap named Bishop was put at the dump scale, was he not? A. When?

Q. About the latter part of October, 1953.

A. No.

Q. Was he put at the dump to scale at any time?

A. I don't recall that Bishop was even employed by us at that time. He may have been, but it was not on the dump if he was.

Q. Was he scaling there at the dump at any time? A. No.

Q. Has he ever scaled there at any time?

A. Bishop?

Q. Yes.

A. He scales for us now. He did not at that time.

Q. Didn't he begin in October, 1953?

A. No.

Q. When did he come into employment with you?

A. I could not tell when he came to work. [61]

Q. Who did scale at the dump in the latter part of 1953 if it was not Mr. Bishop?

Mr. Stark: I beg pardon. I did not hear the question.

(Testimony of S. A. Peters.)

The Witness: He wants to know who scales. A man named Richard Knowlin.

Q. (By Mr. Hilger): And he was your employee at that time? A. That is right.

Q. Did you receive any Vander Jack deliveries after October 21, 1956?

Mr. Stark: What?

Mr. Hilger: Pardon, 1953.

A. I think we received one load.

Q. Outside of that, no further deliveries. Prior to that time, Mr. Vander Jack or Snow Camp Logging Company had been delivering most of your logs, had they not?

A. All of them.

Q. Suddenly, it stopped on or about that date?

A. It was the latter part of October he stopped bringing logs to us, yes.

Q. Do you recall a conversation with Mr. Vander Jack on or about that time regarding the situation of the delivery of logs?

A. He just stopped bringing logs.

Q. Do you remember a telephone conversation with Mr. Vander Jack at or about that time regarding the further delivery of logs?

A. No. [62]

Mr. Stark: Answer so that the reporter can hear you.

A. No.

Q. (By Mr. Hilger): Mr. Green was employed by you at that time, was he not? A. He was.

(Testimony of S. A. Peters.)

Q. He was the general manager or mill superintendent. Which is his designation?

A. Superintendent.

Q. He was there at the mill? A. Correct.

Q. Your employee? A. That is right.

Q. You remember having no discussion with Mr. Vander Jack regarding the situation of the delivery of logs?

A. No. He just stopped bringing them.

Mr. Hilger: Your Honor, we have reached the afternoon recess. I would like to examine the claim.

The Referee: Very well. Take a ten-minute recess, and we are stopping at 4 o'clock, too.

(Recess.)

The Referee: You may proceed.

Q. (By Mr. Hilger): The removal of timber from the area in which Snow Camp Logging Company was operating required the construction of roads, did it not?

A. I assume that it did, yes.

Q. And that was the case at the time this contract of June, 1951, was entered into. Isn't that so?

A. You mean they would have to build [63] roads?

Q. Yes.

A. You have to build roads anyplace to get timber out. There was one or two main roads through it. There was a county road, I think, partly across it.

Q. There would have to be roads through the timber for the removal of timber and those roads would have to be built to Timber, Inc.?

(Testimony of S. A. Peters.)

A. Yes, down to hit the county roads. The county road goes right past my mill, Timber, Inc.'s, mill.

Q. There was in fact a separate road for off-highway traffic built by the Vander Jacks. Is that right?

Q. They built several roads. They had to.

Q. And over their own roads they were permitted to haul whatever loads they could manage, were they not? In other words they were not controlled by the weight limit that exists on the county roads or state roads?

A. The county roads, too.

Q. The county roads are subject to the state limit?

A. You are just the same as on the state roads.

Q. On private roads built by a private operator hauling over those roads, they are not subject to that limitation?

A. He can do as he pleases.

Mr. Stark: Pardon me, counsel. It seems to me we went into this this morning and it was concluded by your Honor that what constructing he did to effectuate the terms of the contract had nothing to do with the matter. If he had to build roads, what of it? We had to build a place to dump the logs. [64] What of it?

Mr. Hilger: Your Honor will recall that counsel reversed that in saying it was material to the contract. I would like to invite attention to *Pacific Construction vs. Modern Steel Company*, a Ninth Circuit case, 211 Fed. at page 49, in which the

(Testimony of S. A. Peters.)

Court held that the plaintiff, having made necessary preparations in and about its mill to fabricate the entire quantity covered by the contract, those preparations for the performance of the contract were an element of damage and that it was proper for the plaintiff to place those damages in evidence and prove such damages.

The Referee: What was the contract?

Mr. Hilger: The contract called for the delivery of an amount of steel to be fabricated and delivered, which would amount to about 1,500 tons, and the plaintiff had provided for the purchase of steel in the quantity to conform to this demand. Before delivery of the same, the defendant terminated further deliveries. It is the same case we have here.

The Referee: You haven't the same case.

Mr. Hilger: We have the statement from the defendant that the requirements would be approximately so many feet, and thereupon the plaintiff set about making preparation to deliver that many feet.

Mr. Stark: Wouldn't you have had to build roads to deliver to Arcata? [65]

Mr. Hilger: We would not have built through down to Timber, Inc.'s, mill, no.

Mr. Stark: You would have built roads.

Mr. Hilger: We are asking for a particular road, one to accommodate the requirements of Timber, Inc. Certainly there are other roads as to which the plaintiff would make no contention inasmuch as they were not specially built in preparation for

(Testimony of S. A. Peters.)

the performance of its duties under this contract, but there were other roads built entirely upon reliance on the requirements indicated by the defendant.

Mr. Stark: If this evidence that building roads is competent, it also could be contended that the cost of the road was enhanced because it was during snow or inclement weather. The construction of the road was part of the duty to deliver logs to the mill, if your Honor please.

Mr. Hilger: I will settle for that. It was part of the duty to deliver to the mill at the contract price as counsel stated. Since it was their duty to provide them, they did provide them and are entitled to damage. Counsel has stated it very well.

The Referee: What did you say about the roads being on the corporation's property?

Mr. Hilger: No, they came to the millsite. As I understand the facts, your Honor, from the timber property they were built, it is our contention, in a certain place and leading to a certain destination because of the requirements under this contract that a certain capacity of production had to be approached. Apparently it is conceded that building roads would be necessary for the performance of this contract.

Mr. Stark: What we concede is this: You would have had to build roads to log that area.

Mr. Hilger: We built one we did not get to use because this defendant refused to accept further deliveries.

(Testimony of S. A. Peters.)

Mr. Goodwin: There is not anything like that in the record.

Mr. Hilger: That is our contention and our proof.

Mr. Goodwin: That is not the record.

The Referee: I don't see how, under this agreement, your right goes so far as building roads.

Mr. Hilger: We do not contend we did have the right to build on their property.

The Referee: I say any right as to the building of roads at all.

Mr. Stark: Do you sustain the objection to the last question?

The Referee: Yes. I have already done it once this morning. I don't see any reason to reverse myself. I don't think the case cited is comparable when you read the facts in the case.

Mr. Hilger: I would renew our offer of proof on this line as made this morning.

The Referee: Very well. And the offer is denied as it [67] was this morning.

Q. (By Mr. Margolis): You gentlemen have seen this document? I show you a document entitled Proof of Claim and ask you whether that is your signature? A. It is.

Q. S. A. Peters? A. Yes.

Q. Under that, "Timber, Inc., a corporation, S. A. Peters." A. Yes.

Q. This claim is prepared by Messrs. Huber & Goodwin on your behalf. Is that correct?

A. Yes.

(Testimony of S. A. Peters.)

Q. Now, you allege in your claim that the Snow Camp Logging Company, a corporation, was at or before the time of the filing of the petition indebted to you and Timber, Inc., in the amount of \$900,000. I show you pages 1 and 2 of the claim.

Mr. Stark: There is no question before you.

Mr. Margolis: I just asked him to read it.

Q. You have read it? A. Yes.

Q. Do you have with you or can you tell us the items that comprise the sum of \$900,000?

Mr. Goodwin: I object to the question at this time. The claim speaks for itself and at this time this is an application for affirmative relief on behalf of the Bankrupt and is not concerned with the proof of our claim at this time.

The Referee: You have already proved your claim by the filing of it.

Mr. Goodwin: Yes, your Honor. I will renew the objection on the ground that the claim speaks for itself.

The Referee: That may all be. Let me see the claim. It says the consideration of its liability arising out of the breach of a certain contract.

Mr. Margolis: A copy of the contract is attached to it.

The Referee: Yes.

Mr. Margolis: It appears on its face to be unliquidated.

The Referee: That is true.

Mr. Stark: That does not mean it cannot be liquidated.

(Testimony of S. A. Peters.)

The Referee: That may be, but it might go to whether or not it is the alleged \$900,000 as shown here. Can you just say that somebody violated a contract; therefore it was \$900,000?

Mr. Stark: It would have been impossible for us, in the document, to have furnished a bill of particulars as relates to the \$900,000 and we were not called on to do so until the attack on the proof was made just the other day, pursuant to the Trustee's Petition.

The Referee: You concede you would have to have a bill of particulars?

Mr. Stark: Of some sort, yes.

The Referee: I guess we can take it orally. The objection is overruled.

Mr. Stark: Now, what is the question, Mr. Margolis?

Mr. Margolis: May we have the question read?

(Question read by the reporter as follows:

"Do you have [69] with you or can you tell us the items that comprise the sum of \$900,000?")

The Witness: Is that the question?

The Referee: Yes.

A. No, I cannot at this time.

Q. (By Mr. Margolis): Can you give us any single item which is a portion of the \$900,000?

A. No, I would not want to do that without going over our records to see what we did set up.

Q. Did you furnish your attorneys, Huber &

(Testimony of S. A. Peters.)

Goodwin, with any information they used as the basis of the claim you executed and verified?

A. I probably did. There are auditors.

Q. Can you tell us whether you did?

A. I don't know whether they received it. Our auditors did.

The Referee: What is your objection to the claim, Mr. Margolis?

Mr. Margolis: It is unliquidated.

The Referee: Is that all; that it is unliquidated?

Mr. Margolis: Yes. We contend it is unliquidated. On the basis that it is unliquidated, we are entitled to go into the items that comprise the claim.

The Referee: But, there is a question whether they have a good claim here?

Mr. Margolis: That is it. I think we have made a prima facie showing. As is usual in cases of this kind, on the evidence [70] already adduced, it is the burden now for the claimant to go forward and attempt to establish it, after which, I think, we would be entitled to put in evidence of our cross-claim.

Mr. Stark: You have made a prima facie showing of what?

Mr. Margolis: That the claim has not been established; that it is an unliquidated claim. Our objection to it is that.

Mr. Stark: We do not dispute that, but the claim is to be liquidated in the trial of the action in Humboldt County now set for the 26th of November.

(Testimony of S. A. Peters.)

Mr. Margolis: That has been ruled on already.

The Referee: As I remember, an oral objection to a claim is good enough, isn't it?

Mr. Stark: I believe so, but he simply objects on the ground that it is unliquidated.

The Referee: I know he says that, but if he said it does not comply with the Bankruptcy Act——

Mr. Stark: Section 57d, your Honor, says that a claim, in effect, can be liquidated in any reasonable manner.

The Referee: I know it says that.

Mr. Stark: And we are doing our best to liquidate it.

The Referee: But, you don't want to do it in the Bankruptcy Court.

Mr. Stark: No, sir.

The Referee: You are here; that is where you are going to stay, so far as I am concerned.

Mr. Stark: Well, the witness cannot state a bill of [71] particulars.

The Referee: He would be entitled, I think, to file a bill of particulars.

Mr. Margolis: Very well.

The Referee: How long will it take you to prepare it?

The Witness: I would have to do it after I went back to Arcata, your Honor.

The Referee: How many days after you get back?

The Witness: I would say two or three days.

(Testimony of S. A. Peters.)

The Referee: I think that is where we are now. I think we can stop right here and give him time to prepare that.

Mr. Stark: If he is through with the witness, I want to ask a couple of questions simply for the purpose of pinpointing in the record what I consider a defense to all this turkey-gobbling as to deducting from figures the man is entitled to receive for logs delivered to us.

The Referee: I don't take it he is through, because he has run into an impasse because the witness cannot answer.

Mr. Stark: He can go onto something else. We have a witness here from Humboldt County.

Mr. Goodwin: We are ready to go ahead with the proof.

The Referee: If the claim is to be liquidated, can it be liquidated?

Mr. Goodwin: Yes. We have a witness who can testify as to various infractions of the Vander Jacks. We are prepared to put all that evidence on tomorrow for the purpose of liquidating the claim.

Mr. Margolis: We brought a witness from the State of Oregon, your Honor, who necessarily will have to come back. I think the Court can set forth the orderly procedure of what to do here.

Mr. Goodwin: The only way we can liquidate our claim is by bringing evidence and testimony before this Court so your Honor can evaluate it.

The Referee: As I say, they can object on the

(Testimony of S. A. Peters.)

ground that it does not comply with the Bankruptcy Act.

Mr. Stark: I don't understand that. The objection is that it is an unliquidated claim.

The Referee: But, the Court finds another defect in it.

Mr. Stark: He did ask Mr. Peters if he can state item by item what goes to make up the \$900,000. He says no and then he asks for a continuance.

The Referee: No.

Mr. Stark: He was just about to.

The Referee: I am going to be the one who makes the continuance whether any one requests it or not.

Mr. Stark: All I want to know is, are they through with Mr. Peters for the moment?

The Referee: I don't think they are.

Mr. Stark: Let them go ahead.

The Referee: His answer has stopped them from going ahead. When is the next time we can give these people? Meantime [73] you better get together and settle your differences.

Mr. Stark: We made a sincere effort to do so. Mr. Margolis said his associate in Humboldt County said he would not accept the offer; his associate said Mr. Margolis would not accept.

The Referee: Can you get all your data together by the 5th of December?

The Witness: I think so.

Mr. Margolis: May we have the understanding that the data be delivered to Mr. Hilger's office

(Testimony of S. A. Peters.)

which is in Eureka, your Honor, five days before December 5th?

The Referee: That is a copy?

Mr. Margolis: Of what he is going to put in.

The Referee: Yes.

Mr. Stark: Before the matter is continued, if Your Honor please, in order to pinpoint into this record at this point an item of prime importance to us, I would like the privilege of asking half a dozen questions of this witness.

The Referee: Go ahead. When Mr. Stark gets through, I will continue the matter to December 5 at 10 a.m., and December 6 also.

Cross-Examination

By Mr. Stark:

Q. I show you a series of checks drawn on the bank account of Timber, Inc., of California, over the period August 25, 1953, to November 9, 1953. I would like to have you read the name of the payee, the date of the check, the [74] amount of the check and the endorsement on the back of each one of them.

Mr. Margolis: Are they going to be offered in evidence, Mr. Stark?

Mr. Stark: They will be offered in evidence.

Mr. Margolis: I think it is taking up the time of the Court unnecessarily. The documents speak for themselves, to paraphrase the argument you made to the Court earlier today.

(Testimony of S. A. Peters.)

Q. (By Mr. Stark): Will you read those checks?

The Referee: Do the checks speak for themselves?

Mr. Stark: Yes, they do, and loudly.

The Referee: Then, why have him testify? Show him all the checks and have them put in evidence.

Mr. Stark: I want to withdraw them for another purpose.

The Referee: Then, why can't it all wait?

Mr. Stark: Because I want it all in the record here. Well, let me introduce them in evidence now.

The Referee: If you are going to leave them here.

Mr. Stark: Can I withdraw them for the purpose of photostating?

The Referee: Oh, no.

Mr. Stark: They are all payable to Snow Camp Logging Company after August and every one, on the back, says, "Payment in full is hereby acknowledged for all logs delivered," giving two dates, and deposited to the account of Snow Camp [75] Logging Company.

Mr. Hilger: We will stipulate they were received by Snow Camp and deposited by Snow Camp.

Mr. Stark: And the money spent.

Mr. Hilger: And the money spent, and simultaneously, with each deposit a letter of protest as to the inadequacy of the amount was forwarded to Peters. I don't feel it is proper to begin at this time and drop it in a few minutes.

Mr. Stark: Let me get it straight, counsel. You

(Testimony of S. A. Peters.)

are saying, are you, counsel, that you have a letter of protest for each of these checks?

Mr. Hilger: I have not counted the letters, but I have letters protesting. They accepted them, but were not accepting them in full payment.

Mr. Margolis: That would raise a legal problem.

Mr. Stark: We have a roomful of legal problems.

Mr. Hilger: Let's not decide on the basis of three questions.

The Referee: I am not going to decide anything yet.

Mr. Margolis: Are you going to offer them?

Mr. Stark: I have decided I will hold onto them awhile.

The Referee: Very well.

Mr. Margolis: I would like to ask for an order at this time restraining counsel and the claimants from proceeding, until this matter is determined before this Court, with any action in the Superior Court of Humboldt County, and in support of my motion I will call your Honor's attention to the case cited in [76] claimant's memorandum which is on file. I believe it is in re Corcoran. This Court has the right, pending the determination of the matter——

The Referee: I don't think there is any question about that.

Mr. Stark: I do not think you are entitled to have an order enjoining the Superior Court.

Mr. Margolis: I did not say the Superior Court. I said proceeding up there.

(Testimony of S. A. Peters.)

Mr. Stark: The effect is the same. He is aware of the cases that hold your Honor hasn't jurisdiction to restrain the State court.

The Referee: I understand that. I am going to restrain counsel and I am going to restrain the plaintiff from proceeding in the State court until this is disposed of at least.

Mr. Stark: Don't you think we are entitled to a pleading?

The Referee: Not under the circumstances.

Mr. Goodwin: You mean we are not going to be restrained by a written order?

The Referee: I will give you a written order, yes, if you want a written order.

Mr. Goodwin: We would prefer it.

The Referee: I will sign an order to that effect, but the restraining order dates from this minute.

Mr. Margolis: That restraining order will remain in full force and effect until it is lifted by an order of this Court? [77]

The Referee: That is correct.

Mr. Margolis: Thank you, your Honor. Will your Honor instruct our witnesses to return on December 5, 1955?

The Referee: The estate will look out for his pay?

Mr. Margolis: Yes, your Honor.

The Referee: You will return on December 5, Mr. Vander Jack, without further order or summons.

(Continued to December 5, 1956, at 10:00 a.m.) [78]

Wednesday, December 5, 1956—10:00 A.M.

Appearances:

For the Trustee:

MAX H. MARGOLIS, ESQ., and
FREDERICK L. HILGER, ESQ.

For the Respondents:

CHARLES M. STARK, ESQ., and
E. EDMUND GOODWIN, ESQ., Rep-
resenting Messrs. Huber & Goodwin.

The Referee: Proceed in Snow Camp Logging Company.

Mr. Margolis: The last witness on the stand at the conclusion on November 7 was Mr. Peters, your Honor.

The Referee: Do you want him back?

Mr. Margolis: Yes.

S. A. PETERS

having been sworn previously, recalled.

The Referee: You have already been sworn.

Redirect Examination

By Mr. Margolis:

Q. Mr. Peters, on November 7 the last matter which was under consideration was the items which compose your claim for \$900,000, and you recall testifying in answer to an inquiry of the Court that it would take you a couple of days to get those items together, and a request was made that that be delivered to Mr. Hilger's office five days prior to December 5. You recall that, do you? A. Yes.

(Testimony of S. A. Peters.)

Q. Now, those items were not delivered to Mr. Hilger's [79] office. Those which you said were turned over to your accountant to put together and then turned over to Huber & Goodwin's office to file the claim were not delivered to Mr. Hilger's office.

Mr. Stark: I filed one.

Mr. Margolis: I will take that up. I am just asking the question.

Q. They were not delivered to Mr. Hilger's office? A. That, I do not know.

Mr. Margolis: There was delivered to my office, your Honor, under date of November 26, a document entitled Bill of Particulars. I don't know whether the original is in Your Honor's file.

The Referee: Yes, I have seen it.

Mr. Margolis: I am going to move to strike this document for any purpose, your Honor, on the ground that it is inadequate.

Mr. Stark: What?

Mr. Margolis: It is inadequate and does not comply with the request that was made in accordance with the witness' testimony that he had all the items which make up the claimed damage of \$900,000. I move that this document be stricken.

Mr. Stark: That is not the way to proceed, your Honor. He is supposed to demand a further Bill of Particulars if he is not satisfied with that.

Mr. Margolis: I think the counsel is in error. The law [80] in that regard is that in a State court action, that a request be made by the defendant for a Bill of Particulars. If he does not make the de-

(Testimony of S. A. Peters.)

mand prior to the time the matter is at issue, he cannot be heard to complain. We went to trial on the claimant's claim and our objections. There is no function for a Bill of Particulars under the Federal Rules. We might have a motion to make the pleadings definite and certain. Here we are relating to objections to a claim and the witness testified he had all the items that comprise the \$900,000. We have an understanding, the record so discloses, he said his accountants prepared those matters and turned them over to his attorneys to file this claim. We asked for them; we were assured we would have them. Instead, we have this document entitled Bill of Particulars with nothing there save the computation arithmetically, which anybody could make. We would like to have the items which comprise the claim. We don't have to make a motion for a further Bill of Particulars.

Mr. Stark: This is an action for damages, if your Honor please, and the amount of damages and how they are to be arrived at is your Honor's prerogative. We cannot file anything except what we filed and we filed it within the time Your Honor ordered us to file. They have had it since November 25. We have not heard a word from them about its inadequacy.

The Referee: Well, I don't think I have the right to strike it.

Mr. Stark: Let it stay there for what it is [81] worth.

Mr. Margolis: It cannot be construed as evi-

(Testimony of S. A. Peters.)

Mr. Stark: We do not ask that it be construed as evidence.

The Referee: It is just on file as a Bill of Particulars.

Mr. Stark: It is just on file as a Bill of Particulars. In no instance is it anything except an affirmative document so they can prepare their defense to it. It is never evidence.

Mr. Margolis: I will abide by your Honor's ruling and proceed.

The Referee: The ruling is that the motion to strike is denied.

Q. (By Mr. Margolis): Now, do you have in your office the items which you told this Court were prepared by your accountants and turned over to Messrs. Huber & Goodwin for the purpose of filing this claim?

A. They are only estimates. That is all we could make.

Q. Didn't you tell us at the last hearing on November 7 that your accountants prepared an itemization which would reveal the basis upon which you filed your claim for \$900,000? Didn't you tell us that at the last hearing?

Mr. Stark: Just a minute, your Honor. I think in fairness to the witness—he has the transcript before him—he should interrogate him in the proper manner: “Did you say such and such and give such and such an answer?” instead of bully-ragging him.

The Referee: He is not bully-ragging him, but I think you are right in your contention. [82]

(Testimony of S. A. Peters.)

Mr. Stark: I will withdraw the word "bullyragging." And, as a matter of fact, if he will read what is said in the transcript—I have full faith in Mrs. Blair—I will stipulate that it is a true and correct statement of what he said. How much damage we suffered is what your Honor is going to decide, if any.

Q. (By Mr. Margolis): Directing your attention to page 69, commencing at line 25 of the transcript, I would like you to read from line 25 on page 69 down to and including line 11 on page 72.

Mr. Stark: While Mr. Peters is reading the transcript, your Honor, can I call your attention, for the purpose of the record, to page 65 of the transcript of the last hearing where Mr. Hilger referred to the case of Pacific Construction vs. Modern Steel Company at 211 Federal page 49. The citation is incorrect. It is page 849.

The Referee: Very well, thank you.

Mr. Peters has read it, Mr. Margolis.

Q. (By Mr. Margolis): The questions and answers you just read were asked and given by you as the questions asked and the answers given?

A. Yes.

Mr. Stark: We will stipulate they were.

Q. (By Mr. Margolis): You tell us now that the \$900,000 is just an estimate. Is that correct?

A. That is all we could do. That is correct. [83]

Q. You have no documents or papers of any items which will reflect the \$900,000 set forth in the claim?

(Testimony of S. A. Peters.)

A. No, only as we put them down ourselves in arriving at them, of what it would take. As the time Mr. Vander Jack stopped bringing logs, the contract had approximately eight years to run, and figuring that I did not know whether I was going to get logs or not, and I did not, figuring what it was going to cost me to go out and buy timber, pay interest on it, hire cruisers, hire men to find timber, a longer haul; I knew everything was going to cost more money and I came up with an estimate that a minimum would be at least \$100,000 a year. Multiplying that by eight, you get \$800,000.

Q. You figured that out yourself?

A. Yes, with Mr. Goodwin and working with our auditor, but my figure. After all, I am the one who knew what the cost was going to be approximately. Whether it is enough or too much today, Mr. Margolis, I don't know. We still have about seven years to run. I cannot tell what the answer is going to be, whether it is going to be greater or going to be less.

Mr. Margolis: I have no further questions on this point.

Q. (By Mr. Hilger): Mr. Peters, you received last Tuesday night a subpoena directing your appearance here. Is that correct? A. Yes, sir.

Q. And that contained a direction that you bring with you the log deck scale records for August and September, 1953? [84]

Mr. Goodwin: No, 1956.

(Testimony of S. A. Peters.)

Mr. Hilger: The record does reveal as to that that it is 1956.

Q. I will go to the records of daily production during August, and September, 1953.

A. Is that the last question on there. I mean, the last one? May I see it?

Q. (By Mr. Hilger): Yes.

A. Well, your first one about records of daily production of lumber, we did not keep.

Q. You have no such records?

A. We have no records. They would be immaterial. They would not be a bit of use to anybody, even ourselves.

Q. How about the daily log deck scales?

A. Well, when we first started, for a month, possibly six weeks, we kept a log deck scale. It meant nothing, took up time. We discontinued it. We never used it.

Q. Even had the subpoena read log deck scale records for 1953, then, you would not have been able to produce such records?

A. We have no such records.

Q. Do you have the daily log purchase records for August, and September, 1953?

A. They will be just exactly as shown on those statements.

Mr. Goodwin: Excuse me. I think there is one there outside the period you asked for.

Q. (By Mr. Hilger): I am showing you, Mr. Peters, what [85] purports to be five invoices on the printed form of Snow Camp Logging Company, ad-

(Testimony of S. A. Peters.)

dressed to Timber, Inc., and it is your contention that this is the extent of your log purchase records for the period shown on the face of these invoices, August, through October 15, 1953.

A. Those were the only logs we purchased, yes, sir.

Q. Now, then, all of these invoices were received by you from Snow Camp Logging Company. Is that correct? A. Yes.

Q. Did you make payment to Snow Camp Logging Company for the amount shown on these invoices as due for logs delivered?

A. No. I made them according to the agreement I had made with Mr. Vander Jack.

Q. At the last session your counsel had certain checks that you had sent to Snow Camp Logging Company. Do you have these checks here this morning?

Mr. Goodwin: Do you want them for the same period?

Mr. Hilger: May I ask, counsel, if you have the invoice for the last half of July?

Mr. Goodwin: I don't have the invoice; I have the check. Here are all the checks and photostatic copies. The invoice for the last half of July is what you want?

Mr. Hilger: Yes. While you are looking that up, I will proceed.

Q. I show you a Snow Camp invoice, one of which was just handed to me, dated August 19, and

(Testimony of S. A. Peters.)

purporting to cover logs [86] delivered August 1st to 15th, 1953.

I also show you check No. 5599 of Timber, Inc., of California, bearing date August 25, 1953, apparently bearing the signature of S. A. Peters. Is that your signature? A. Yes.

Q. This check I am showing you, is that the check submitted in payment of the logs shown on this invoice?

A. Yes, that would be the one for August 1st to 15th.

Mr. Goodwin: Mr. Hilger, could I suggest that you perhaps might have the statement offered for identification, so we can refer to it? Otherwise the record will be quite confused, with reference to this and that.

Mr. Hilger: As soon as the witness answers this question, I intend to offer both documents.

Mr. Goodwin: O. K.

Q. (By Mr. Hilger): Is that the check that was issued by you covering the logs shown on the statement dated August 19, 1953?

A. Yes, this would be for the first half of August.

Q. And you made no further payment to Snow Camp for these particular logs, other than evidenced by this check dated August 25, 1953?

A. That is right.

Mr. Hilger: I would like to offer the two documents together as an exhibit, your Honor.

(Testimony of S. A. Peters.)

Mr. Goodwin: May we substitute photostatic copies?

Mr. Hilger: Yes.

The Referee: It will be Trustee's No. 6. [87]

(The invoice of Snow Camp Logging Company dated August 19, 1953, and check No. 5599 of Timber, Inc., of California dated August 25, 1953, were admitted in evidence as Trustee's Exhibit No. 6.)

The Witness: Mr. Goodwin, we don't have any copies of these invoices. Do you want photostatic copies of these?

Mr. Hilger: We can stipulate that these can be photostated and the originals withdrawn.

The Referee: I will mark it.

Mr. Hilger: That stipulation will apply as to all these invoices I am offering, covering the period from July 15, through October 15.

Q. Now then, Mr. Peters, I show you one of the invoices of Snow Camp Logging Company which you have just handed me, this being dated August 10, 1953, addressed to Timber, Inc., purporting to cover logs delivered July 16 to 31. That is from your records, is it not? A. Yes, it is.

Q. Now I will show you Check No. 5535 dated August 10 in the amount of \$52,715.33, apparently bearing the signature "S. A. Peters." Is that your signature? A. That is my signature.

Q. That check was issued in payment of the statement of August 10, 1953?

(Testimony of S. A. Peters.)

A. That is right.

Q. And that is the only payment that has been made against the statement dated August 10, 1953?

A. Yes.

Mr. Hilger: I will substitute a photostatic copy of the [88] check and offer these two items as the next in order.

The Referee: Trustee's No. 7.

(The statement of Snow Camp Logging Company of August 10, 1953, and check No. 5535 of Timber, Inc., of California, were admitted in evidence as Trustee's Exhibit No. 7.)

Mr. Goodwin: If it is any assistance, we are willing to stipulate that each invoice was issued and——

Mr. Hilger: The related check sent?

Mr. Goodwin: And that is the only amount paid on the account.

Mr. Hilger: Very well.

For the record, I will identify the statement as Snow Camp, dated September 4, 1953, purporting to cover logs delivered August 16 to 31, and related thereto is check dated September 10, 1953, by Timber, Inc., in the amount of \$47,699.53. I will offer those as the next in order.

The Referee: Trustee's No. 8.

(The statement of Snow Camp Logging Company of September 4, 1953, and check of Timber, Inc., of California, dated September 10,

(Testimony of S. A. Peters.)

1953, were admitted in evidence as Trustee's Exhibit No. 8.)

Mr. Hilger: I will identify for the record invoice of Snow Camp dated September 21, 1953, addressed to Timber, Inc., covering logs delivered September 1st to 15th, 1953, and related thereto, check drawn by Timber, Inc., No. 5699, dated September 25, 1953, in the amount of \$31,441.16. I will offer [89] those two items as the next in order.

The Referee: Trustee's No. 9.

(The invoice of Snow Camp Logging Company of September 21, 1953, and check of Timber, Inc., of California, dated September 25, 1953, No. 5699, were admitted in evidence as Trustee's Exhibit No. 9.)

Mr. Hilger: Now I will identify for the record the invoice of Snow Camp Logging Company dated October 5, 1953, covering logs delivered September 16, to September 30, 1953, and related thereto check drawn by Timber, Inc., No. 5719, dated October 10, 1953, in the amount of \$44,626.36, and I offer them as the next in order.

The Referee: Trustee's No. 10.

(The invoice of Snow Camp Logging Company of October 5, 1953, and check No. 5719 of Timber, Inc., of California, dated October 10, 1953, were admitted in evidence as Trustee's Exhibit No. 10.)

Mr. Hilger: I will identify for the record Snow

(Testimony of S. A. Peters.)

Camp Logging Company's invoice dated October 20, 1953, addressed to Timber, Inc., bearing date—rather, purporting to cover logs delivered October 1, to 15, 1953, and related thereto, check drawn by Timber, Inc., No. 5758 in the amount of \$17,940.69. I offer that as the next in order.

The Referee: Trustee's No. 11.

(The invoice of Snow Camp Logging Company of October 20, 1953, and check No. 5758 of Timber, Inc., of California, dated [90] October 25, 1953, were admitted in evidence as Trustee's Exhibit No. 11.)

Mr. Stark: Your Honor, so that we can get along, neither ourselves nor Mr. Hilger, apparently, have the invoice pursuant to which the check last in the group in the amount of \$561.25, Check No. 5786, dated November 9, 1953, was issued, but my associate has suggested that we stipulate that this check was issued pursuant to an invoice in the sum of——

Mr. Hilger: \$1,044.92.

Mr. Stark: Pursuant to an invoice for the amount last given by Mr. Hilger, and no further or other funds besides this \$561.25 check was paid by our people in the discharge of that asserted obligation.

The Witness: Pardon me just a minute. In that file there I think there is a pink slip that might show the footings.

Mr. Goodwin: I think your figure is probably

(Testimony of S. A. Peters.)

right. The stipulation remains the same. This check for \$561.25 was issued pursuant to an invoice submitted to us by Snow Camp Logging Company for \$1,044.92.

Mr. Hilger: We will offer a copy of the check No. 5786 of Timber, Inc., in the amount of \$561.25 dated November 9, 1953.

The Referee: Trustee's No. 12.

(The check No. 5786 of Timber, Inc., dated November 9, 1953, was admitted in evidence as Trustee's Exhibit No. 12.)

Q. (By Mr. Hilger): Now, Mr. Peters, I am showing you a [91] letter, or a copy of a letter dated October 15, 1953, addressed to S. A. Peters and Timber, Inc., and apparently coming from the Office of Mathews & Traverse, attorneys. Are you familiar with the fact that at that time Mr. Mathews represented Snow Camp Logging Company?

A. Yes.

Q. Did you receive the original of that letter?

A. If that is in my file, I presume I did.

Q. Do you want to refer to your file?

Mr. Goodwin: That won't be necessary. I think I have a copy in my file. I will stipulate it was received.

The Witness: I just want to be sure it was in our file.

Mr. Hilger: We offer the copy as the next in order—unless you want to produce the original.

Mr. Goodwin: We are satisfied to use the copy,

(Testimony of S. A. Peters.)

your Honor. We have no objection to the introduction of the letter for the limited purpose I understand Mr. Hilger wants it for, that a protest was made. There are following paragraphs that are self-serving and redundant. We don't want it introduced as proving the truth of those.

Mr. Hilger: We offer it only for the purpose of showing a protest of the payment as made by Snow Camp. The second and third paragraphs may be ignored so far as we are concerned.

Mr. Goodwin: On the basis of ignoring the second and third paragraphs, we have no objection.

The Referee: Trustee's No. 13.

(The copy of the letter dated October 15, 1953, from [92] Mathews & Traverse to S. A. Peters and Timber, Inc., was admitted in evidence as Trustee's Exhibit No. 13.)

Q. (By Mr. Hilger): Now, referring to the invoice marked Trustee's No. 11 (2), the face of it bears typewriting and also pencil writing. That pencil writing was put on at your office, was it not? A. That is right.

Q. And the typed portion was the statement as you received it? A. Yes.

Q. And that would apply to the pencil adjustments that are made on all these invoices that have been introduced?

A. That would be correct, yes.

Mr. Hilger: No further questions.

The Referee: Redirect?

Mr. Goodwin: We will call Mr. Peters as our own witness subsequently.

The Referee: Very well.

(Witness excused.)

Mr. Margolis: May the record show, your Honor, that I am turning over to counsel for the Claimant the documents entitled "Statement," and which bear the Court's designation "Trustee's Exhibits 6, 7, 8, 9, 10, and 11," all being statements on the stationery of Snow Camp Logging Company, which by stipulation of counsel for Claimant, they will have photostated and placed in the record in lieu and in place of these originals.

The Referee: Very well. Let the record so show.

Mr. Goodwin: Six separate statements we [93] have.

Mr. Hilger: At this time, your Honor, I would like to read into evidence the deposition of Walter Friesen taken at Eureka, California, on Thursday, October 25, 1956.

Mr. Goodwin: Just a moment, Mr. Hilger. That is Mr. Friesen?

Mr. Hilger: Yes.

Mr. Stark: Are you going to read the questions and Mr. Margolis the answers?

Mr. Margolis: Whichever way you wish.

Mr. Goodwin: This was on Notice of Taking Deposition, which notice is dated October 11, 1956, and was served on me on the same date, that the deposition of Walter Friesen will be taken on the 25th of October, according to this notice.

Mr. Stark: Have you the Federal Rules of Procedure here, your Honor?

The Referee: What section are you referring to?

Mr. Stark: Rule 26 (a) would be related to the taking of depositions.

The Referee: I have it.

Mr. Stark: Will you read it, your Honor?

The Referee: Do you want the whole section read?

Mr. Stark: I think I can show the portion. I will read it to you, (reading):

“Rule 26. Depositions pending action.

“(a) When depositions may be taken. By leave of Court after jurisdiction has been obtained over any [94] defendant or over property which is the subject of the action, or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action, or for both purposes.”

No leave of Court was obtained for taking this deposition about to be offered. We object on that ground.

The Referee: What about it?

Mr. Margolis: It does not say in all cases with leave of Court. In certain cases they may be taken without leave.

The Referee: What do you say? Says something about without leave?

Mr. Margolis: “* * * or without leave after an answer has been served * * *”

This deposition was taken on October 25. We filed the objections, which constitute the answer, on October 3. We don't have to have leave of Court to take the deposition.

Mr. Stark: The objection is a complaint for affirmative relief.

Mr. Hilger: It is also an objection to the claim before this Court; also an answer.

Mr. Margolis: An answer and a cross-complaint.

The Referee: Judge St. Sure ruled on what a claim was at one time. [95]

Mr. Stark: I know what he ruled.

The Referee: What did he rule?

Mr. Stark: That it was an affidavit setting up facts that would permit the allowance of the claim or not.

The Referee: Yes, but he also went further. He said the objection to the claim is in the nature of a complaint.

Mr. Stark: And if he said that, that rule is applicable, because the objection is a complaint. No answer was filed at the time they took the deposition, and they did not get your permission to do it.

The Referee: I remember that one.

Mr. Stark: And you remember that he was a good lawyer, if he was irascible.

The Referee: He surely was a good lawyer. What about it, gentlemen?

Mr. Margolis: I would like to look at the de-

cision, your Honor. I always went on the theory that the filing of a claim constituted a pleading.

The Referee: A claim is never a pleading. It is only evidence. The objection to the claim is the complaint, and if they want to make answer to it, they can make answer to the objection.

Mr. Stark: Mr. Margolis indicated he wants to make an examination of the law. I suggest we set aside offering the deposition until such time as your Honor rules.

Mr. Margolis: We will retake the deposition and make [96] application to the Court for an order.

The Referee: Do you want me to rule now?

Mr. Stark: We will submit it.

Mr. Margolis: I would like to read the case, your Honor.

The Referee: I will give you an opportunity. Then we cannot dispose of the deposition.

Mr. Margolis: Apparently not.

Mr. Stark: It is true that you did not get an order of the Court for any of them?

Mr. Margolis: We did not make any application.

The Referee: The rule is very specific and says a deposition shall be taken only in accordance with these rules. It could not be much more definite.

Mr. Stark: It could not be much more flat-footed. Then, the Circuit Court of Appeal for every circuit in the nation has ruled that those Rules have the force of law and statute.

The Referee: I will withhold the decision on this. We cannot go ahead with the matter of the deposition, then, at this time.

Mr. Margolis: May we have a short recess, your Honor, so I can discuss the matter with Mr. Hilger?

The Referee: Yes, take a ten-minute recess.

(Recess.)

The Referee: You may proceed, gentlemen.

Mr. Margolis: In the absence, your Honor, of the authority with respect to the nature of the claim, I would like to point [97] this out: We went on the theory that the claim constituted the complaint, and the objections raised the issues of the objections to the claim. On that basis we concluded it was not necessary to procure an order authorizing the taking of depositions, and furthermore, on each of these depositions—I think there were perhaps ten or more in number—there was no objection made on the ground urged, and which was urged only for the first time on November 7th at the first hearing. Counsel for the Claimant appeared and cross-examined. On that basis we feel the depositions should be accepted as evidence in this case. If your Honor has a contrary view, we do not at this time wish to read the depositions, and since the Claimant was unprepared at the last hearing to proceed, and in order to conduct this matter in an orderly manner, we will necessarily have to make application to the Court for leave to retake the depositions and burden the estate with unnecessary expense. I think under all the circumstances, the fact that counsel appeared at the taking of the depositions and raised no objec-

tion at that time, and participated in taking the depositions——

Mr. Stark: Pardon me——

Mr. Margolis: May I finish?

The only objection raised was also raised here, which your Honor ruled upon, with respect to the jurisdiction of this Court. The Claimant filed his and its claim. I don't think it would be equitable at this time, your Honor, to put the estate to the expense of retaking the depositions. [98]

The Referee: How can I get around that one line?

Mr. Margolis: The fact that they appeared, made no objection, cross-examined.

The Referee: To whom would they make the objection?

Mr. Stark: That is the point exactly.

Mr. Margolis: They could have come before this Court, or the District Court. They could have made the objection as of record in taking the deposition, and left.

The Referee: I don't think they are bound to do that.

Mr. Stark: In the event that we were, let me read to your Honor the statement by Mr. Goodwin at the time of the taking of the deposition of Mr. Harry Harlan Hershey (reading):

“Mr. Goodwin: * * * Before the deposition commences, I would like to make a statement for the record.

“May the record reflect that I am appearing here specially by reason of a notice of taking deposition

served upon me by Messrs. Margolis and Hilger who appear to be the attorneys of record for the trustee in the bankruptcy matter. In so doing I do not admit or acknowledge that any jurisdiction exists herein or that this deposition may properly or legally be taken at this time or place or at all or that the Court herein has any jurisdiction of any of or part of the subject matter * * *''

The Referee: That disposes of that portion of your argument, [99] does it not?

Mr. Hilger: I was present at the taking of these, and the only point discussed between counsel was whether or not jurisdiction attached to allow the taking of the depositions, or taking any action whatsoever.

The Referee: But his language is broad enough to cover that very point.

Mr. Hilger: It is broad enough.

The Referee: I think even if he had not objected, he could have objected here.

Mr. Stark: For all we knew, the deposition might never be offered. It might be taken and not used. Our time to make objection is when it is proffered to your Honor.

The Referee: I think so. Under the particular statement that this is the only way that a deposition can be taken.

Mr. Stark: I believe, if my recollection serves me right, that when Mr. Goodwin told me of the notice, being aware of the rule, I told him, or dictated to him, or told him to write in longhand, a

memorandum that he could read into the record that would cover it all.

Mr. Margolis: However that may be, your Honor, there is substantial testimony in these depositions which will be of aid to this Court.

The Referee: I cannot use something—

Mr. Margolis: Very well. Under the circumstances, we know now that it will be necessary for us to continue the matter [100] and make an appropriate motion to the Court for an order authorizing the retaking of all these depositions. We cannot proceed at this time in an orderly manner to properly present the objections to the claim and matters relating to the application for relief as set forth in the objections.

Mr. Stark: In that connection, I think they should be required to put on the balance of their case other than the depositions, if they have anything further, and let us proceed with ours. We come down here from time to time at great expense.

The Referee: What would be the difference in proceeding and putting in the depositions last?

Mr. Margolis: Mr. Hilger had some views on it. The continuance at the last hearing, your Honor, was at the request of the Claimant, because he did not have these matters here that your Honor wanted.

The Referee: But this is a different situation. The continuance really was granted to Mr. Stark, because he said he had just been called into the matter so far as the trial was concerned.

Mr. Stark: Why can't they go ahead with their

case? They should be prepared to try it and let the depositions go in last.

The Referee: I think you should proceed with the case if you have any more to put in. If you have not——

Mr. Stark: And rest, subject to the depositions.

The Referee: Surely.

Mr. Hilger: Would we have leave to make a motion for the [101] retaking?

The Referee: I am not precluding that.

Mr. Stark: I think it should be formal, reciting the list of depositions.

Mr. Hilger: The application will also state the time and place and people involved, but we would wish to ascertain at this time that the submission of the matter, even if it is continued today, to present other matters, that the submission would be delayed until we have that opportunity.

The Referee: Surely.

Mr. Stark: Mr. Goodwin just said that we don't want to impede the matter. We are willing that your Honor make a minute order that the depositions of these specifically named persons may be taken on notice of the time and place to us.

The Referee: What about it?

Mr. Margolis: Without a formal order?

Mr. Stark: Yes. Make a minute order at this time authorizing them to take the depositions and give us notice of the time and place of taking them, and a list of the depositions they are going to take.

Mr. Hilger: I will read into the record the names of Walter Friesen, Barbara Jarvella, Charles

Heckard, George Staveland, Harry Hershey, Dan Dare, Benjamin Dare, Harry O'Rourke, Ray Slobig, Merle Montgomery, and Virgil H. Ray.

Mr. Margolis: In other words, your Honor, my discussion with Mr. Hilger was to this effect: In the event other [102] witnesses are available, and are not those named for the record, to adopt Mr. Goodwin's and Mr. Stark's suggestion, we could, by the interchange of a letter, have your Honor make an additional minute order upon receipt of the letter to take additional depositions.

Mr. Stark: That might run on forever, Mr. Margolis.

Mr. Margolis: No, no. We are interested in winding this up. I understand there was difficulty in procuring the whereabouts of some witnesses. There might be one or two more. We want it understood that we shall not be restricted to the depositions of those Mr. Hilger read into the record.

Mr. Stark: Now they come here prepared to try their case; we come to defend. We are entitled to know where this procedure stops. He read into the record the names of a dozen people or more, and indicated no one else they could produce as a witness by deposition or otherwise. I think they should be confined to the persons whose names were read into record.

Mr. Hilger: No objection.

The Referee: I think you are right.

Now, gentlemen, haven't you put yourself in the position where I can ask this question: Have you any objection to the contents of these depositions?

Mr. Stark: Yes, we do have some objections to certain questions.

The Referee: I know. I mean, have you any objection that you would not have raised if the depositions were in proper form? [103]

Mr. Stark: Yes, your Honor, because if you notice there, when we made our blanket statement about the illegality of taking the depositions, we participated no further in the matter and reserved any right to cross-examine.

Mr. Hilger: I will take exception to that. They cross-examined each and every, all and singular persons. The transcript will so reveal. The facts were fully developed by counsel for both sides in every deposition.

The Referee: Is that the fact?

Mr. Stark: I was not there.

Mr. Goodwin: I, or someone from my office, attended the depositions.

The Referee: Did you cross-examine?

Mr. Goodwin: In most instances we did. I believe in one or two we did not.

The Referee: Now, aside from those?

Mr. Hilger: You asked Barbara Jarvella some questions specifically?

Mr. Goodwin: That is right, I did.

Mr. Hilger: You did not ask Mr. Friesen any questions?

Mr. Goodwin: That is what I was thinking of.

The Referee: I am not so sure, gentlemen, that by your stipulation you have not waived the real objection to these depositions.

Mr. Stark: You mean by asking questions on cross-examination? [104]

The Referee: No.

Mr. Stark: We did not even have to, for the specific reason we knew they were illegally taken.

The Referee: You object that no notice was given?

Mr. Stark: Right. No order made permitting.

The Referee: No order for the taking of the depositions. Now you stipulate it is not necessary except for a minute order being made. How have you been harmed under your stipulation?

Mr. Stark: I don't think we have been harmed at all under our stipulation, because we want a thorough exploring of the testimony of these witnesses, all of whom are strangers to us, which we did not do. Because of the fact of what Mr. Goodwin, when I pointed out the rule, told me, I did not think it necessary for me to run up to participate in the depositions.

Mr. Hilger: I have the eight-page deposition of Charley Heckard. More than five pages are taken up by Mr. Goodwin's cross-examination.

Mr. Stark: Be that as it may, if you did not have any right to take the deposition, you did not have the right.

The Referee: There is no question about that, but I am not sure of the stipulation made in open court.

Mr. Stark: It is jurisdictional, your Honor. That they could be permitted to take a deposition, or

participate in taking an illegal deposition, would not be jurisdictional.

The Referee: I agree with you.

Mr. Hilger: Is it your position that you would not have [105] the power to stipulate that these depositions could now be used?

Mr. Stark: No, we don't.

Mr. Hilger: I submit the matter.

The Referee: I think it is jurisdictional; there is no question.

Mr. Hilger: Would it follow, then, that they could not stipulate that these could be used? I don't think that is the situation if they raised no objection to these and stipulated they could be read into evidence as they now are. I believe that is perfectly proper. They have the power to stipulate that an objection of that sort be waived.

The Referee: I suppose so far as a stipulation is concerned, it would not be any different.

Mr. Stark: Well, Mr. Goodwin, after all this arguing of mine, has said that in his opinion the depositions are so innocuous we are inclined to let them be read into the record, because I am aware of the approaching holiday season and the fact that your Honor's duties in the ordinary run-of-the-mill in this court are arduous, and it is expensive to go and take the depositions over. It will result in asking the same questions and the giving of the same answers. Mr. Goodwin, of course, is chief counsel in the case. If he is willing that they come in, although I don't know what the contents are, I am.

The Referee: I will ask you this: Do you want to take an adjournment now to two o'clock to give you a chance to read the depositions? We will open them all up. [106]

Mr. Goodwin: Maybe we could save some time of the Court if we did that, for the reason that while I have gone over the depositions, I think between now and two o'clock I could mark in our copy the objections I want to raise.

Mr. Hilger: I think at the taking of the depositions it was stipulated that all objections were reserved except as to the form.

Mr. Goodwin: Yes.

Mr. Hilger: If counsel will waive the objection as to that, counsel would still have ample opportunity to object to any question.

Mr. Goodwin: Very well. Suppose we adjourn until two o'clock.

Mr. Margolis: Do I understand that the objection to the fact that no order was procured for taking the depositions is now waived?

The Referee: Let's not get into any argument. Mr. Goodwin has stipulated he is satisfied the depositions may go into evidence.

Mr. Margolis: Very well.

The Referee: That is it, isn't it?

Mr. Goodwin: Yes.

The Referee: Subject to your objections.

Mr. Goodwin: Yes.

Let us discuss this, if I may: Mr. Hilger, I assume, will read the questions, and Mr. Margolis the answers. Is it your [107] Honor's desire that the

objections should come in as he reads the question?

The Referee: I think it is better to have the objection come in at that time. It may take a little longer, but it will keep a cleaner record.

Mr. Margolis: Thank you, your Honor.

(Adjourned to 2:00 p.m.) [108]

Afternoon Session

Same appearances.

The Referee: You may proceed in Snow Camp Logging Company.

Mr. Hilger: At this time I would like to read into evidence the deposition of Walter Friesen taken at Eureka, California, on Thursday, October 25, 1956. I will read the questions and Mr. Margolis will read the answers (reading):

DEPOSITION OF WALTER FRIESEN

“By Mr. Hilger:

“Will you state your name, please?

“A. Walter Friesen.

“Q. And where do you reside, Mr. Friesen?

“A. In Arcata.

“Q. Humboldt County, California? A. Yes.

“Q. What is your trade or profession?

“A. Accountant.

“Q. During the summer and early fall of 1953 by whom were you employed?

“A. By Timber Incorporated.

(Deposition of Walter Friesen.)

“Q. And were you located at their Redwood Creek mill?

“A. No, sir, I was in town.

“Q. You were in town. Now, what were your duties at that time with Timber Incorporated?

“A. I was Office Manager and Accountant for Timber Incorporated.

“Q. You had charge of their books and records?

“A. Right.

“Q. In connection with those duties it was your duty [109] to check and approve for payments invoices for logs received and purchased by Timber Incorporated?

“A. My first computation of the invoices was to check it and then the actual payment would be made and the manager or owner would sign the checks. He would approve them.

“Q. Who was that? A. S. A. Peters.

“Q. Now then, do you recall the logs—rather, the invoices for the logs delivered by Snow Camp Lumber or Logging, rather, during that time?

“A. Yes.

“Q. Would you describe how the price and payment for those logs was computed at, say, in June and July of 1953?

A. The logs were scaled by a scaling bureau and they were billed to us by Snow Camp on the basis of the scale at a set price per thousand, and the price extended on the basis of the logs delivered and the price was reduced at four dollars from

(Deposition of Walter Friesen.)

the so-called market price in Arcata for logs delivered at Redwood Creek.

“Q. In reviewing those invoices to see that they were proper did you test them by that price formula? A. Yes.

“Q. Now then, was there any change in the method of computing the price on those logs during August or September of '53?

“A. Yes. [110]

“Q. What was that change?

“A. The first instance Mr. Peters came to me and handed me an invoice from Snow Camp and asked me to retype it and lower the price four dollars and make out the invoice in its corrected form as he had approved it and make the check out for it and give it back to him.

“Q. In other words, the price was reduced four dollars per thousand over what the original computation had shown? A. Yes.

“Q. Did Mr. Peters give you any reason for this four dollars a thousand reduction?

“A. Not that I recall.

“Q. And when did you leave the employ of Timber Incorporated?

“A. About September the 10th or 11th, I think it was the 11th.

“Q. Of 1953? A. 1953.

“Q. And you are not familiar with what took place thereafter?

“A. Not to my knowledge, no.

“Mr. Hilger: That's all.

“Mr. Goodwin: No questions. Thank you.”

Mr. Hilger: At this time I would like to read into evidence the deposition of Barbara Jarvella, taken at Eureka, California, on Thursday, October 25, 1956 (reading):

DEPOSITION OF BARBARA JARVELLA

“By Mr. Hilger:

“Would you state your name, please? [111]

“A. Barbara Jarvella.

“Q. Where do you reside?

“A. Arcata, at 25 Seventeenth Street.

“Q. That is in Humboldt County, California?

“A. Yes.

“Q. What is your trade or occupation?

“A. I am a bookkeeper, clerk, typist.

“Q. Referring to the period of August, 1953, at that time by whom were you employed?

“A. I was employed by Timber, Incorporated, on the 14th of August.

“Q. That's when you started—your duties then were as bookkeeper?

“A. Not at first, I started as an invoice clerk.

“Q. Would that have to do with log purchases?

“A. Log purchases and lumber invoiceing?

“Q. Will you recall from whom Timber, Incorporated, was purchasing logs according to the log tickets at that time?

“A. They were buying from Snow Camp, and it seems to me they were buying from Chezem, and

(Deposition of Barbara Jarvella.)

the brand 'Top Hat' rings a bell—it could be that was Snow Camp's brand, or some other company's. I don't know just when Walkers came in but it could have been during my first two or three months.

"Mr. Hilger: That's all. [112]

"Cross-Examination

"By Mr. Goodwin:

"Mrs. Jarvella, you have no recollection of the dates when any of these particular purchases were being made from these companies?

"A. No, not definitely.

"Q. Sometime after you started your employment? A. Yes.

"Mr. Goodwin: That's all.

"Mr. Hilger: That's all."

Mr. Hilger: I would like to read into evidence at this time the deposition of Charles Heckard, taken at Eureka, California, on Thursday, October 25, 1956 (reading):

DEPOSITION OF CHARLES HECKARD

"By Mr. Hilger:

"Will you state your name, please?

"A. Charles Heckard.

"Q. Where do you reside, Mr. Heckard?

"A. In Arcata, Bloomfield Acres.

"Q. That's in Humboldt County, California?

"A. Humboldt County, California.

(Deposition of Charles Heckard.)

“Q. And during 1953 how and where were you employed?

“A. I was truck boss for the Snow Camp Logging Company.

“Q. And briefly what were your duties in connection with that job?

“A. Well, hiring gyppo trucks, running our seventeen trucks, trying to [113] dispatch the logs, keep the trucks maintained.

“Q. And in connection with those duties were you familiar with the facts and the circumstances of the hauling operations to the mill at Timber Incorporated, Redwood Creek?

“A. Yes, sir, I was up there every day.

“Q. Were there any delays in unloading of your trucks at the mill? A. Yes, sir.

“Q. Were those often?

“A. Yes, quite often.

“Q. What was the cause of those delays?

“A. Well, logs jamming in front of the dumps so they couldn't dump no logs.

“Q. Did you ever request a pond man or dump man or anyone else that Timber Incorporated clear the jams?

“A. I went to the mill quite a few times.

“Q. Do you recall who you spoke to?

“A. Well, I don't remember the man's name. He was a mill Foreman. I talked a few times to Mr. Green, got him, but he was the mill Superintendent. I just can't recall the man's name.

“Q. Would it be Bob Kendall?

(Deposition of Charles Heckard.)

“A. I do believe that’s the man, but I won’t swear for sure.

“Q. He’s the mill Superintendent or mill Foreman?

“A. Mill Superintendent was his capacity.

“Q. What happened, if anything, as a result of your request that these jams be cleared? [114]

“A. Well, two or three times he come over and looked at it and say there’s nothing they could do and have to saw some more logs which wasn’t right because there was a lot of open water on the pond. Once or twice I run a bunch of trucks around the pond and got the big off the highway truck, the private road truck and loosened up the jams myself as best I could and dumped the trucks. In fact, I had to hire gyppo trucks on a thousand basis, they wasn’t making no money on deliveries, was working on percentage, and the trucks were on a thousand basis and the drivers were on a percentage basis.”

Mr. Goodwin: If your Honor please, at this point I would like to object to the last sentence just read, commencing with the words “In fact,” and ending with the words “percentage basis,” on the ground——

The Referee: Let me get the question.

(Question re-read by Mr. Hilger.)

Mr. Goodwin: He goes on to say that he ran the trucks around and cleared them himself, and then the voluntary statement that he hired gyppo

(Deposition of Charles Heckard.)

trucks on a thousand basis; they were not making money; and so forth, which obviously is not responsive.

The Referee: It may be stricken.

Mr. Hilger (Continuing reading): "Q. In company with Mr. Bud Vander Jack you took some pictures out there in the fall of '53, did you not, at the mill? [115]

"A. Yes.

"Q. The pond and the trucks?

"A. Yes, and I took—George Stevens was with me when I took them.

"Mr. Hilger: Off the record.

"(Discussion had off the record.)

"Mr. Hilger: Did these delays—were these delays in the unloading of your trucks frequent or seldom?

"A. Well, I would say they was running towards the last, I would say the last three weeks we hauled in there, that's as near as I can remember, that was averaging about every three days, two days, we'd have it plugged again, some days it would be the next day we'd have it plugged.

"Q. In other words, where there was a plug it would delay deliveries?

"A. Two, three days.

"Q. Two to three days? A. Yes.

"Q. That was towards the last just before Vander Jack quit making deliveries at the mill?

"A. Yes, yes, sir, that's right. Well, you see, it was——

(Deposition of Charles Heckard.)

“Q. (Interrupting): Was it—would you say that the deliveries were worse then than they were previously or not?

“A. Oh, yes, sir, by far. I would say there was no attempt to keep logs from jamming.

“Q. That was during the last month that deliveries were made by Vander Jack to the mill? [116]

“A. Yes.

“Q. Do you recall the last day that Vander Jack made deliveries there to the Peters mill?

“A. Yes.

“Q. You’re familiar with the facts and circumstances that occurred that day? A. Yes, sir.

“Q. Would you relate those?

“A. Well, I sent—I had a little truck, we had stakes put on it purposely for hauling logs to the mill, small logs to the mill, and loaded it up with—it wasn’t even licensed for the highway loads, we loaded it up. I followed it in. They scaled it. Then they refused to give us—when they scaled it we went and dumped and the driver went back to pick up the ticket. He told him he had orders not to give him a ticket.

“Q. Not to give him a scale ticket?

“A. Not to give him a scale ticket, so we didn’t have nothing, no records, nothing whatsoever of anything that the load was dumped.

“Q. Now, that scale ticket is the receipt that the logger gets for his logs that are delivered?

“A. That’s right, that’s the truck driver’s re-

(Deposition of Charles Heckard.)

ceipt for when he's working on a twenty-five per cent basis of what he's made on that trip.

"Q. In other words, it's the document that contains [117] the information that is necessary to compute the price of the logs, the amount of money that is represented by the logs and also——

"A. (Interrupting): That's right.

"Q. (Continuing): ——also used in computing the driver's pay? A. Right.

"Q. And it's also the receipt that the mill received those logs? A. That's right.

"Q. And you say that the scaler that scaled that load refused to——

"A. (Interrupting): Give us a receipt. He said he was under instructions to just make one copy and that went to the mill.

"Q. He was to give no tickets to Vander Jack trucks? A. No.

"Q. Do you know who that scaler was?

"A. No, sir, I can't tell you because there's a lot of things——

"Q. (Interrupting): Was it a regular scaler that had been there from the Bureau?

"A. No, sir, he was not. He was a company man that they brought in there.

"Q. You mean a Timber Incorporated man?

"A. A company man.

"Q. It wasn't Merle Montgomery, was it?

"A. The head scaler for Snow Camp.

"Q. And he was a scaler that had been there in the [118] past? A. Yes.

"Mr. Hilger: That's all.

(Deposition of Charles Heckard.)

“Cross-Examination

“By Mr. Goodwin:

“Q. Mr. Heckard, as a matter of fact, this last load that you're referring to, Mr. Merle Montgomery was there then, wasn't he? A. No, sir.

“Q. Where was he?

“A. He was down the road, I would say approximately a mile and a half at an established scaling ramp.

“Q. Where he had been moved by the Vander Jacks, isn't that right?

“A. He scaled logs that went to town from down there.

“Q. He had been moved down there by the Vander Jacks? A. Yes.

“Q. Yes. He also scaled the logs that went to this mill, didn't he?

“A. Not this particular load he did not.

“Q. Well, isn't it a fact that he scaled all the logs that came off the Vander Jack operation?

“A. Not all of them afterwards, up to that time, yes.

“Q. You mean that this is the first load that he did not scale? A. Yes, sir.

“Q. Why didn't he scale this load?

“A. Because it came off the hill from up on the [119] company side. He was down at the—he was down the road a mile and a half from where this come off.

“Q. So of all the thousands of truck loads that

(Deposition of Charles Heckard.)

went in there this is the only one that Mr. Montgomery didn't scale that you know of?

"A. Yes. Well, no, I wouldn't say that, because he had a relief scaler there, Mr. Hershey scaled, too.

"Q. Mr. Montgomery or his assistant scaler scaled all the logs. You're quite sure neither one of them scaled this load? A. I am positive.

"Q. Now, customarily when you took a truck load of logs into the mill and they were scaled and dumped they were customarily scaled by Mr. Montgomery or his assistant? A. That's right.

"Q. And the truck driver got a copy of a scale ticket? A. Right.

"Q. Then the scaling bureau sent the Vander Jacks and also Timber Incorporated a copy of the scaling tickets, didn't they?

"A. As near as I know, yes, sir.

"Q. So you never delivered any logs to Timber Incorporated where the logs were scaled by their scaler, did you? A. Yes, one load.

"Q. This one load? A. Uh-huh.

"Q. This is the only instance that this ever happened, is that right?

"A. To my knowledge, yes. [120]

"Q. So never before had you asked Timber Incorporated's check scaler for a receipt?

"A. Well, I'll tell you——

"Q. (Interrupting): Or a scale ticket?

"A. That was the first load after the pond was

(Deposition of Charles Heckard.)

cleared up they refused to accept Montgomery's scale, so I was told. I don't know, I wasn't in——"

Mr. Goodwin: I move to strike that last statement as a voluntary statement calling, obviously, for hearsay. It reads as follows (reading):

"That was the first load after the pond was cleared up they refused to accept Montgomery's scale, so I was told. I don't know, I wasn't in——"

The Referee: It may go out.

Mr. Hilger (Continuing reading): "Q. (Interrupting): Let me interrupt you for just a moment. You don't know anything about that of your own knowledge, do you? A. No.

"Q. Okay. Fine. Now let's go on. Let me ask you this question again: You never delivered logs to Timber Incorporated when—when I say 'you' I mean the trucks under your supervision, whereby a Timber Incorporated scaler gave you any scale tickets, did you? A. Not that I know of, no.

"Q. So then for the first time and only time this load that you are referring to, this last load [121] came into the dump and for the first and only time in the entire operation that you know of you asked a Timber Incorporated scaler for a copy of the scale ticket and he told you no? A. Uh-huh.

"Q. Is that right? A. Uh-huh.

"Q. And that all other deliveries prior to that logs had been scaled by Mr. Montgomery or Mr. Montgomery's assistant who gave the drivers their receipt? A. Uh-huh.

(Deposition of Charles Heckard.)

“Q. All right. Now, who are you employed by now, Mr. Heckard?

“A. I am not employed.

“Q. You are not employed. How long did you work for Snow Camp?

“A. Oh, I would say around the neighborhood of three years.

“Q. How big of a log pond did they have up there at Timber Incorporated's mill?

“A. Oh, I couldn't tell you exactly. I imagine it was—you could safely say a million and a half storage pond.

“Q. They had one log dump?

“A. No, they had one and they had a crane that they unloaded some of the logs with.

“Q. Into the pond or into the deck?

“A. Into the deck.

“Q. But as far as dumping in the pond there was only one dump, wasn't there? A. Yes.

“Q. Isn't it a fact that with that physical [122] set-up like that that you are going to experience a certain amount of delay any place on occasions?

“A. Yes, temporarily, a little.

“Q. Logs are bound to criss-cross and pile up at the dump once in awhile any place, aren't they?

“A. Oh, sure.

“Q. And when that happens depending on the efficiency of the operation it's going to take some amount of time to straighten it out. If it's an efficient operation and they have an adequate crew, I

(Deposition of Charles Heckard.)

am asuming they'd go and straighten the jam out pretty quick most of the time, isn't that right?

"A. Yes.

"Q. If they are inefficient that takes longer?

"A. Yes.

"Q. Timber Incorporated did have a pond man on the job all the time, didn't they?

"A. I imagine so, yes.

"Q. His duty was to keep the dump open as much as he could, isn't that right?

"A. Well, yes, I would say so.

"Q. That's what he worked on occasionally, didn't he, trying to keep it open?

"A. No, I wouldn't say that. There towards the last he just let them jam up. When we couldn't dump any more trucks he just stayed there and helped on the pond saw. [123]

"Q. Now, of course, over there, that would be where they had been getting the logs out of the pond and into the mill, isn't that right?

"A. Sawing them, bucking them in lengths and putting them in the slip pond.

"Q. And, of course, the effect of that would be to create more open water for more logs, more storage room, that would be the result of his efforts, wouldn't it? A. Yes, I imagine so.

"Mr. Goodwin: I think that's all.

(Deposition of Charles Heckard.)

“Redirect Examination

“By Mr. Hilger:

“Q. This new scaler that had been installed there at the mill pond, he had just been installed a day or so when this——

“A. (Interrupting): Yes.

“Q. (Continuing): ——incident occurred?

“A. As far as I know.

“Q. It was the last load that was delivered to Timber Incorporated? A. That’s right.

“Q. And you said this was the first load that had been delivered there since he came in?

“A. After the pond jammed, it got cleared up so we could dump, where we could dump.

“Q. And then the first resumption of deliveries after that took place was this load that we have discussed? [124] A. Yes, sir.

“Q. Where they refused to give a receipt for logs? A. Yes, sir.

“Mr. Hilger: That’s all.

“Recross-Examination

“By Mr. Goodwin:

“Q. Just one more question.

“Mr. Heckard, as a matter of fact, this check scaler of Timber Incorporated’s had been on the job for quite a long time, hadn’t he?

“A. I couldn’t tell you. I didn’t see the man around there before.

(Deposition of Charles Heckard.)

“Q. You hadn’t seen him there before?

“A. Not to my knowledge. I may have seen him but didn’t know who he was or anything.

“Q. You don’t know how long, then, that Mr. Peters or Timber Incorporated had been check scaling, you couldn’t say that of your own knowledge? A. No, sir.

“Mr. Goodwin: Okay, sir. Thank you.

“Mr. Hilger: That’s all.”

Mr. Hilger: I would like at this time to read into evidence the deposition of George Staveland, taken in Eureka, California, on Thursday, October 25, 1956.

The Referee: Proceed.

Mr. Hilger (Reading):

DEPOSITION OF GEORGE STAVELAND

“By Mr. Hilger: [125]

“Q. What is your name, please?

“A. George Staveland.

“Q. And where do you reside, Mr. Staveland?

“A. At Airway Heights in Arcata.

“Q. That’s in Humboldt County, California?

“A. Yes.

“Q. During the summer and fall of 1953 what was your occupation?

“A. I was a truck driver for Snow Camp Logging Company.

“Q. What kind of a rig were you driving?

“A. I was driving an off highway logging truck.

(Deposition of George Staveland.)

“Q. Now then, will you describe that vehicle as to its size and weight and function?

“A. Well, the truck was—it was ten foot wide, two foot over width for legal highway, and it was—weighed fifty thousand pounds, truck and trailer, which was overweight for the highway.

“Q. For highway? A. Yes.

“Q. Would it be feasible to operate that rig on the highway, a public highway, that is?

“A. No, it wouldn't be feasible at all.

“Q. It was designed, then, primarily and entirely for operation on private roads?

“A. That's right.

“Q. Where were you hauling logs during the summer of '53?

“A. I was hauling in to Peters mill in Redwood Creek. [126]

“Q. That would be Timber Incorporated's mill?

“A. That's right.

“Q. Now, was there at any time during the period of the summer and early fall of '53 any occasion upon which the unloading of your rig was delayed? A. There was several occasions.

“Q. What was the longest delay that you experienced in unloading?

“A. The longest delay was my truck sat there for either two or three days.

“Q. Two or three days waiting unloading?

“A. Yes.

“Q. What was the reason that it was not unloaded?

(Deposition of George Staveland.)

“A. Well, there were logs piled clear to the brow log on the dump which made it impossible to dump any more logs and there were—was open water in the pond if they had cleared the log jam, but they did not make any effort to do so.

“Q. Do you recall approximately when this occasion occurred?

“A. I believe it was on or about the 15th of October.

“Q. Of '53? A. '53.

“Q. Now then, did you observe any other trucks being subjected to similar delays in unloading?

“A. Yes, there was a number of trucks lined up there, probably twelve or fifteen trucks, I would say.

“Q. Now then, during this period did you observe any other trucks, other than Vander Jack trucks, at the pond either unloading or waiting unloading?

“A. There were trucks there other than Vander Jack trucks.

“Q. Do you know whose trucks they were?

“A. No, I do not and I do not know who they were hauling for.

“Mr. Hilger: All right. That's all.

“Cross-Examination

“By Mr. Goodwin:

“Q. Just a moment, Mr. Staveland. On this off highway truck that you drove you didn't go any place except to Timber Incorporated, isn't that right? A. That's right.

(Deposition of George Staveland.)

“Q. Were you delivering any logs any place at all? A. No.

“Q. Did you operate this truck all the time or was some other driver working on it once in awhile?

“A. I drove it steady all the time.

“Q. And how many months were you employed by Snow Camp?

“A. I was employed from approximately June the first, 1952, until June the 20th, 1954.

“Q. Approximately two years, a little over?

“A. Yes. However, I did not drive that truck all that time, but I did drive it all of the summer of 1953. [128]

“Q. I see. Now, there was only one log dump on this pond, wasn't there? A. That's right.

“Q. There was only one place where logs could be dumped? A. That's right.

“Q. The way the pond was constructed and as the logs were dumped over this dump they would naturally congregate or collect in one small location until they were hauled out of it there and drug out of there, isn't that right?

“A. Well, not necessarily. However, sometimes logs would cross and they would tend to pile up in front of the dump. That's if they were not taken care of, yes.

“Q. And when that happens it's quite easy to build up a plug and bog the dump down?

“A. If the logs are deliberately left there and more logs dumped on top of them.

“Q. The only way it can be unplugged is by

(Deposition of George Staveland.)

men getting in and physically separating the logs and dragging them away?

“A. Yes, that’s right.

“Q. This was a relatively small log pond, wasn’t it? A. Well, yes.

“Q. It had a capacity of perhaps a million and a half feet?

“A. I would say that would be pretty close.

“Q. And when the trucks came in to the dump they came in on a narrow road, so to speak, they all came in and [129] dumped in the same direction, isn’t that right? A. That’s right.

“Q. If you came into a log dump and there was a truck there dumping his logs you would have to pull in behind him and wait until he was out of the way before you could dump? A. Yes.

“Q. Only one truck could be accommodated at a time? A. Dumped at a time.

“Q. That’s the general practice, too, at any sawmill, isn’t it, there’s customarily only one log dump? A. Yes.

“Q. When was this pond built?

“A. Well, I couldn’t say that for sure. It was there when I came to work for Vander Jack in 1952.

“Q. Now, as a matter of fact, in a situation like that, a physical set-up like that where there’s a pond of that size and a dump of that type and a road approach of that type, in any sawmill you’re going to from time to time experience delay and plugging of the dump, aren’t you?

(Deposition of George Staveland.)

“A. Well, I wouldn’t say that that was the case, because usually in any pond they take care of that when they dump one load, they make sure the logs are clear for the next load. They don’t—

“Q. (Int’g): But wouldn’t you say that there’s a normal delay in any log dump that arises on occasion?

“A. For ten to fifteen minutes, yes. [130]

“Q. And logs plugging the dump, that’s bound to happen occasionally, isn’t it?

“A. No, I wouldn’t say that it is. I have hauled logs to almost every dump in the County and I can’t recall of any instance where I was delayed for more than, say, twenty minutes or half an hour while they cleared the pond.

“Q. You have been delayed, though, for that amount on many occasions, haven’t you?

“A. Yes, that’s right.

“Q. Now, there was a pond man at this dump, wasn’t there? A. Yes.

“Q. His duty was to keep the logs unplugged, keep the dump open? A. Yes.

“Q. He was there regularly? A. Yes.

“Q. He was there every day, wasn’t he?

“A. Yes.

“Q. He worked on keeping the dump open?

“A. He did as a rule, but these instances that the pond was—dump was plugged, why, that’s why it was plugged. He deliberately let it become plugged.

(Deposition of George Staveland.)

“Q. Well, of course, if trucks are lined up there in one line they dump one load after another and it's a little difficult for a pond man to unplug the dump, isn't it?

“A. No, there's a man there that operates the dump. The truck driver [131] doesn't do it, and between him and the pond man they usually keep the dump clear. They dump a load and then they go look and make sure there's no logs crossed or anything. Then they dump another load.

“Q. Of course, it's a customary thing for a truck driver to be in a hurry; he wants to get unloaded as fast as he can, doesn't he?

“A. Yes.

“Q. And you put some pressure on the pond man normally to get his logs off the truck as fast as he can so he can go get another load, isn't that the normal course?

“A. Truck drivers want to get out of there as soon as possible. I don't know as he influences the dump man any.

“Q. Now, at the time that you—this was October the 15th when you recall that the dump was plugged for two or three days, that was on October 15th, 1953?

“A. I would say that it was on or near that date.

“Q. And there was open water in the pond?

“A. That's right.

“Q. Was anybody working on it, the pond man working on the pond during that period of time?

(Deposition of George Staveland.)

“A. They were working on the pond. They were not making any effort to clear the jam at the dump.

“Q. What were they doing, Mr. Staveland?

“A. They were shoving out logs in towards the mill to saw. [132]

“Q. How much open water was there?

“A. Oh, as I would recall, I would say that the pond was probably one-fourth empty.

“Q. One-fourth empty. What volume of logs was piled up by this plug?

“A. Oh, perhaps seventy-five thousand feet.

“Q. So the plug could have been accommodated if it were cleared out? A. Very easy.

“Q. Now, during this period of time that you were hauling to this dump you stated, I believe, that you were delayed on several occasions?

“A. That's right.

“Q. This long delay, however, is the one that you were referring to that occurred on about October the 15th. The others were more or less routine delays?

“A. Well, a time or two previously when we had been delayed, myself and Charles Heckard, the truck boss, and two or three other drivers who I do not recall who they were specifically, hooked lines on the logs and cleared the jam ourselves.

“Q. Cleared it yourself? A. Yes.

“Mr. Goodwin: That's all.

(Deposition of George Staveland.)

“Redirect Examination

“By Mr. Hilger:

“One moment, one more question.

“During this time, the summer and fall of '53, how [133] were you paid by Vander Jack, on a per thousand basis or on a salary?

“A. I was paid a monthly salary.

“Mr. Hilger That's all.”

Mr. Hilger: I would like to read into evidence the deposition of Harry Hershey, taken in Eureka, California, on Thursday, October 25, 1956.

The Referee: Proceed.

DEPOSITION OF
HARRY HARLAN HERSHEY

Mr. Hilger (Reading): “What is your name, please? A. Harry Harlan Hershey.

“Q. And where do you reside, Mr. Hershey?

“A. At 959½ D Street, Arcata.

“Q. That's Arcata, California?

“A. Uh-huh.

“Mr. Goodwin: What was the street?

“A. 595½ D.

“Mr. Goodwin: Thank you.

“Mr. Hilger: That's in Humboldt County?

“A. Humboldt County, California.

“Q. In 1953 where were you employed?

“A. I was employed by the Snow Camp

(Deposition of Harry Harlan Hershey.)

Logging Company as a scaler located in Redwood Creek Valley at the Peters mill.

“Q. Would that be the mill of Timber Incorporated?
A. Timber Incorporated mill.

“Q. From what period of time or over what period of time in 1953 were you at that location? [134]

“A. Just a moment. I was there approximately from June through up until a period that Snow Camp left off logging at the Timber Incorporated mill. The approximate date there I don't know when that terminated.

“Q. You were there from June up——

“A. (Int'g) Through the period that they were——

“Q. (Int'g) Delivering logs to Peters mill?

“A. Yes.

“Q. Did you, during that period of time, have an opportunity to observe the log pond there at the mill?
A. I did.

“Q. Will you describe its condition?

“A. The mill pond, when I went there, was approximately half full of logs which was ample logs to keep the mill in operation, and the thing I observed working there was the fact that they didn't have ample help on the pond to keep the log jams broke at the dump. Consequently, the logs would not dump, they would have to dump the trucks and the logs not being straightened out and moved away from the dump, they would pile up, jam up there till they couldn't even dump any more. They had

(Deposition of Harry Harlan Hershey.)

to hold them in the straps and that would continue till they had—some of Snow Camp's truck drivers would volunteer their own help, after a truck was empty they would hook the lines on the logs and [135] try to break them by pulling away from the dump, you follow my explanation, if possible there.

“Q. Was there any delay in unloading trucks while this condition existed?

“A. Yes, quite frequently. As to the number of times and the period of time that they were held up, I can't say definitely how long it was, but I know there was several times when the trucks would set with logs on the truck overnight and that is——

“Q. (Int'g) What was the reason for that?

“A. Well, I——

“Q. (Int'g) Because they couldn't be unloaded?

“A. Because they couldn't be unloaded at the dump. The dump was jammed. They couldn't pile any more over it.

“Q. During the period of time that you were at the Timber Incorporated mill was there ever any time when there were insufficient logs in the pond to keep the mill in operation?

“A. No, I don't believe so, to my knowledge.”

Mr. Stark: Will you read that?

(The question and answer were read by the reporter as follows:

(Deposition of Harry Harlan Hershey.)

“Q. During the period of time that you were at the Timber Incorporated mill was there ever any time when there were insufficient logs in the pond to keep [136] the mill in operation?

“A. No, I don’t believe so, to my knowledge.”)

Mr. Stark: In other words, there were sufficient logs at all times?

Mr. Hilger: That is correct. (Continuing reading):

“Q. And during the period of time while you were at the Timber Incorporated mill did you observe anyone other than Vander Jack trucks unloading logs into the Timber Incorporated pond?

“A. Yes. At the close of my job there just before the mill was—Snow Camp left there, there was trucks there from Wheeler Logging Company and an occasional truck from Walker Brothers and there were other individual trucks which I did not know. I wasn’t too well acquainted with the drivers and the trucks at that time. I was just new in the territory.

“Q. But you did know the Vander Jack trucks?

“A. Yes, I rode to work in them.

“Q. These were not Vander Jack trucks?

“A. No, they was more or less what I call gyppo trucks.

“Q. I see. A. Yes.

“Mr. Hilger: That’s all.

(Deposition of Harry Harlan Hershey.)

“The Witness: Now, whether they were hauling for someone else or for Vander Jack, I don’t know, because I couldn’t swear to that. [137]

“Mr. Hilger: That’s all.

“Cross-Examination

“By Mr. Goodwin:

“Mr. Hershey, who were you employed by during this period of time?

“A. Clarence Vander Jack.

“Q. And in what capacity?

“A. As a substitute scaler.

“Q. As a substitute scaler. Who was the head scaler?

“A. Montgomery, Merle Montgomery.

“Q. Your job was to assist him? A. Yes.

“Q. Did you spend all your time there at the log dump at the pond?

“A. I did during that time, yes.

“Q. That’s from June until delivery stopped in the fall of ’53? A. Yes.

“Q. What did you do, what were your duties?

“A. I was log scaler.

“Q. You were assisting Mr. Montgomery in scaling the logs, is that right?

“A. Yes, I’ll explain that further for you. The trucks were coming in there and when these other gyppo trucks was hauling in there it give Montgomery too much work. He couldn’t keep the work done properly. You pile too much work on one man

(Deposition of Harry Harlan Hershey.)

and it isn't possible for him to take care of it properly. So I would scale at the [138] alternate trucks.

"Q. Who paid your wages, Mr. Hershey?

"A. Snow Camp Logging Company.

"Q. Snow Camp Logging Company. Now, as a matter of fact, as a matter of practice didn't the Vander Jack trucks, Snow Camp trucks usually go to town in the morning and go to the Peters or Timber Incorporated dump in the afternoon, wasn't that the general rule? A. No.

"Q. It wasn't?

"A. I'll enlighten you there, too. Peeler logs that were too big logs, that were too big for the Peters mill, their mill is a gang mill, you understand?

"Q. Yes.

"A. They could only saw a certain size log.

"Q. Yes.

"A. Well, the trucks that had those logs over and above that size, those logs were scaled and went to town. It didn't make any difference if they come in the first thing in the morning or the middle of the day or late in the afternoon.

"Q. As a general rule didn't the drivers go to town in the morning and then make the Timber Incorporated deliveries in the afternoon?

"A. No, I wouldn't say that, sir.

"Q. You wouldn't say that? A. No, sir.

"Q. All right. On occasions the log dump was plugged, [139] is that right?

(Deposition of Harry Harlan Hershey.)

“A. Quite frequently.

“Q. As a matter of fact, Timber Incorporated had a pond man there, didn't they?

“A. They had one.

“Q. Yes, on the pond? A. Uh-huh.

“Q. That was his job to keep the dump open, wasn't that right?

“A. That was supposed to have been his job.

“Q. He was on the job every day, wasn't he?

“A. Well, as much as he could he did, I think.

“Q. Now, how big is this pond?

“A. Now you've got me stumped there.

“Q. Would it be around seven acres?

“A. In acreage?

“Q. Yes, would you say it was around seven acres? A. I would say about six.

“Q. About six acres. How many thousand feet of logs can you put in a pond per acre, logs of this type?

“A. Well, that's kind of a hard question there, sir, be about——

“Q. (Int'g) Be about two hundred thousand feet, wouldn't it?

“A. Well, it will vary, yes.

“Q. Would you say that it would be a fair estimate?

“A. I was just trying to do some mental thinking here. I would judge about two hundred and fifty thousand would hit awful close. [140]

“Q. That's feet?

“A. Yes, to a level measure.

(Deposition of Harry Harlan Hershey.)

“Q. So, in your opinion, this pond might hold in full a million and a half feet of logs, is that right? A. Yes, it should easy enough.

“Q. Now towards the end of the log deliveries you say you notice some other trucks delivering logs at the pond? A. Uh-huh.

“Q. You mentioned Wheeler Logging Company and occasional trucks from Walker and others?

“A. Yes.

“Q. You don't know whether these other or these gyppos were hauling for Vander Jack or not, is that right? A. That I couldn't say.

“Q. Thank you. Right at the end of the deliveries by Snow Camp, wasn't it? A. Yes.

“Q. And, as a matter of fact, at that same period of time Snow Camp deliveries had had a substantial decline in volume, hadn't they?

“A. Well, they had dropped off some but the reason I couldn't tell you.

“Q. But they had declined?

“A. Yes, slightly.

(Recess.)

The Referee: You may proceed.

Mr. Hilger: At this time I would like to read into evidence the deposition of Dan Dare, taken in Eureka, California, [141] on Thursday, November 29, 1956.

The Referee: Proceed.

DEPOSITION OF DAN DARE

Mr. Hilger (Reading): "For the record, would you state your name, please?"

"A. Dan Dare.

"Q. Where do you reside, Mr. Dare?"

"A. 959 D Street, Arcata.

"Q. That is Humboldt County?"

"A. Yes, Arcata.

"Q. What is your trade or occupation, Mr. Dare?"

"A. I had been a log buyer up until the 6th of November for Western Studs, and when Western Studs sold out, for Pacific Studs.

"Q. When did you begin buying logs for Western Studs?"

"A. January 2nd, '51. Before that I was scaling for Western Studs.

"Q. How long have you been working in the timber and lumber industry?"

"A. Ever since I started working.

"Q. Ten, fifteen years?"

"A. About that, yes, sir.

"Q. Referring to the summary of 1953, did you buy any logs at that time from Snow Camp Logging or Vander Jacks? A. Yes.

"Q. That was for Western Studs?"

"A. Uh-huh.

"Q. What type of lumber does a mill such as Western [142] Studs produce? A. Studs.

"Q. That is two-by-four upright studs for residential construction? A. Uh-huh.

(Deposition of Dan Dare.)

“Q. You know what a gang mill is, do you not?

“A. Uh-huh.

“Q. How does the type of logs that is required for a stud mill compare to the type of log that would be used by a gang mill? Would they be similar?

“A. They would be similar to a certain extent.

“Q. Now, in the summer of '53 upon what basis did you buy logs from the Snow Camp Logging Company? A. Camp run.

“Q. Where is the Western Stud mill located?

“A. Just north of Arcata on Highway 299.

“Q. That would be described as in the Arcata area? A. I think so.

“Q. Did you, in connection with your purchase of these logs from Vander Jack, make any inspection of their timber source?

“A. What do you mean?

“Q. Did you go out and look at the woods that they were operating in? A. Yes.

“Q. And you observed the type of tree and type of timber that they had available?

“A. Uh-huh.

“Q. Did you also observe their operation? [143]

“A. Uh-huh.

“Q. Was that in the Redwood Creek area?

“A. Uh-huh.

“Q. Did you observe them haul or deliver any logs from that show to the Peters mill?

“A. Yes; I seen a lot of them go in there.

“Q. Could you describe the quality of logs that

(Deposition of Dan Dare.)

you observed being delivered to the Peters mill by the Vander Jacks?

“A. It was just an average log.

“Q. Camp run?

“A. Uh-huh. They was just an average run of logs.

“Q. Would a gang mill require peeler logs for its operation? A. That I couldn't say.

“Q. Did you observe during that time the pond at the Peters mill? A. Uh-huh.

“Q. Did you observe the logs in it?

“A. Yes; I seen them.

“Q. How would you describe the quality of the logs that you observed there?

“A. They was small, but they was good logs, average, same logs we were getting.

“Q. Could you describe them as being the same quality of logs that Western Studs received?

“A. Uh-huh. [144]

“Q. Were the logs that Western Studs received from Vander Jack acceptable merchantable logs?

“A. Uh-huh.”

Mr. Goodwin: If it please the Court, I object to that question as calling for the conclusion and opinion of the witness as to the logs Western Studs received from Vander Jack as being acceptable merchantable logs.

The Referee: What was the capacity of this man?

Mr. Hilger: He was a log-buyer, identified as having ten to fifteen years' experience in that area

(Deposition of Dan Dare.)

in that business. It was his function on behalf of Western Studs to buy logs.

The Referee: Wouldn't that be in the nature of expert testimony?

Mr. Hilger: Certainly.

Mr. Goodwin: The term used was whether acceptable merchantable logs. I submit no proper foundation was laid to qualify this man. Admittedly, he was a log buyer. To qualify him as to whether he knew what was merchantable, no foundation was laid.

The Referee: Did you cross-examine him on that?

Mr. Goodwin: I don't remember.

Mr. Stark: Not only that; he previously testified he observed logs in the pond on one or several occasions. This is a blanket question, what type were in the pond.

Mr. Hilger: My question was, were the logs acceptable merchantable logs. I am asking a man established to have had [145] ten to fifteen years' experience in that lumber area. His specific duty was to buy logs for his employers. If he does not know what a merchantable log is, I don't see what further I can show in connection with his duties with Western Studs, I asked the question.

Mr. Stark: I misunderstood the question. I thought it was were the logs Vander Jack was giving us acceptable. I don't care what they gave Western Studs.

Mr. Goodwin: I withdraw the objection.

(Deposition of Dan Dare.)

Mr. Hilger (Continuing reading): “Q. Would they be described as camp run logs?

“A. That’s the way we bought them.

“Q. And would they be described as meeting that standard?

“A. As far as I know, they would. You have the differential, though. Camp run is supposed to include peelers and all, actually.

“Q. Would that hold true for a log that of necessity had to be thirty-six inches or less in diameter at the large end?

“A. A number three peeler could be as low as twenty-four inches on the small end.

“Q. On the small end? A. Uh-huh.

“Q. What—would logs that of necessity had to be thirty-six inches or less on the large end, would that type of log include many peelers?

“A. Not many. [146]

“Q. So that for a log with that dimension limit, camp run would not have many peelers in it?

“A. No; not many.

“Mr. Hilger: That is all.

“Cross-Examination

“By Mr. Goodwin:

“Mr. Dare, it would have some peelers, wouldn’t it? A. Bound to.

“Q. In that size category? A. Bound to.

“Q. Did you see any peelers at the Peters mill when you were there?

(Deposition of Dan Dare.)

“A. I wasn’t paying any attention.

“Q. You didn’t pay any particular attention to the grade of logs, is that right, sir?

“A. No; I didn’t. They was just average run of logs.

“Q. Now, that was by reason of your general observation of the logs in the pond at the mill?

“A. We was buying the same logs off the same side. That’s the reason I say this was a average run of logs, because that’s what we got.

“Q. Are you basing your opinion on the general quality on the logs that you got?

“A. And what I seen go in there, yes.

“Q. I beg your pardon, what you saw——

“A. (Interruping): What I seen go in [147] there.

“Q. Did you buy on grade? A. No.

“Q. Well, as a matter of fact, Mr. Vander Jack had a contract with your company to deliver certain volumes of logs, did he not?

“A. Not that I know of.

“Q. You don’t know of any contract between your employer and Mr. Vander Jack?

“A. No.

“Q. Then, therefore, of course, you wouldn’t know what such a contract might say, would you?

“A. Not hardly.

“Q. Was your employer during that—your immediate superior during that time a gentleman by the name of Lyle Baker?

“A. I believe he was, yes.

(Deposition of Dan Dare.)

"Q. He subsequently went into business with Mr. Vander Jack, didn't he?

"A. I believe so.

"Q. As a matter of fact, it was in the fall of 1953 when he and Mr. Vander Jack went into business, didn't they? A. I think they did.

"Q. Isn't it a fact that they were partners in various logging ventures around?

"A. I don't know whether they was partners in any logging ventures. The way I understood it, it was supposed to be a wholesale deal.

"Q. Lumber wholesalers?

"A. I don't know whether it was or not. [148]

"Q. You don't know whether Mr. Baker had anything to do with the logging operation or not?

"A. No.

"Q. During this summer and fall of 1953 Mr. Baker was in charge of the Western Studs saw-mill? A. Uh-huh.

"Q. And he was your boss? A. Uh-huh.

"Q. And he was a close friend, was he not, of Mr. Vander Jack? A. Seemed to me, yes.

"Q. They were together regularly?

"A. Well, quite a bit, yes.

"Q. Quite a bit. And it was for some period of time starting in the fall of 1953 that they were associated together in business?

"A. Over here in Eureka, yes.

"Q. Yes. Mr. Baker never told you of any contract with Vander Jack? A. No.

"Q. On camp run log deliveries, Mr. Dare, what

(Deposition of Dan Dare.)

would be, in your opinion, the average deductions over, say, a two-week period in percentagewise?

"A. That would depend entirely on the logging show.

"Q. On the logging show? A. Uh-huh.

"Q. What would be your opinion that the average deduction should be on logs from the area, the Redwood Creek area, that Mr. Vander Jack was operating [149] in 1953?

A. Sometimes his deductions went as high as thirty-five per cent. Other times they'd go down to around ten per cent.

"Q. What would you say would be an average?

"A. That would depend entirely on the show.

"Q. Well, on that show of the summer of 1953 what would it average?

"A. They run two or three different sides there.

"Q. What about—do you remember where they were operating in September of 1953?

"A. No; I couldn't say.

"Q. If you received logs during 1953 that had an average of fifteen per cent or less deduction over a two-week period, would you say that those logs were better than camp run?

"A. I'd say they was average.

"Q. You'd say they was average.

"A. Uh-huh.

"Q. What percentage of number three's would have been average during 1953, Mr. Dare?

"A. We sold all our studs three and better.

"Q. I mean what percentage of camp run

(Deposition of Dan Dare.)

logs—— A. (Interrupting): Oh, I see.

“Q. (Continuing): ——should be number three’s in 1953 to be camp run?

“A. Let’s see, if I remember right, we was buying on a basis of fifteen per cent grade [150] three’s.

“Q. That was pretty much the standard of the industry at that time, wasn’t it?

“A. That’s excluding the size.

“Q. Excluding the size? A. Uh-huh.

“Q. In other words, fifty per cent camp—pardon me, strike that. Fifty per cent number three’s, for example, wouldn’t be camp run, in your opinion, in 1953, would it?

“A. That depends on whether you’re talking about size or grade.

“Q. On grade.

“A. Fifty per cent grade, no.

“Q. Would be—you’d say fifteen per cent number three’s on grade would be about what you’d call camp run? A. Yes.

“Q. And if you had received during a period, substantial period of time, as much as, say, an average of fifty per cent number three’s on grade would your opinion be that that would not be camp run? A. Probably not, yes.

“Mr. Goodwin: I think that is all I have. Thank you.

(Deposition of Dan Dare.)

“Redirect Examination

“By Mr. Hilger:

“Q. You mentioned something about a difference between number three by size, number three by grade? A. Uh-huh. [151]

“Q. What is the difference between classifying log numbers three by size and classifying number three by grade?

“A. Any log under twelve inches is an automatic three.

“Q. That is on the little or big end?

“A. That is on the small end.

“Q. Regardless of the grade of that log?

“A. That is—it’s just a number three.

“Q. So that a large percentage of small logs would then create a large percentage of number three’s? A. That’s right.

“Q. Automatically?

“A. Uh-huh. Peters had an awful lot of automatic three’s.

“Q. Small logs? A. Uh-huh.

“Q. And in the scaling of low quality logs a deduction is made from the total gross scale to compensate for low grade?

“A. What do you mean?

“Q. Is there a deduction made for defect in logs in scaling the logs?

“A. Oh, yes, that is the idea of it.

“Q. In other words, if the log is of low quality

(Deposition of Dan Dare.)

or low grade a deduction will be made from the footage contained in that log to compensate for that low grade? A. Yes.

“Q. And the mill men would only pay on the net footage after that deduction?

“A. That’s right. [152]

“Mr. Hilger: That is all.

“Recross-Examination

“By Mr. Goodwin:

“Q. Theoretically, the net scale that a mill buys logs on is supposed to be the recoverable lumber in the log, isn’t that right?

“A. Supposed to be the merchantable lumber, that’s right.

“Q. So that a scaler deducts out a visible defect and curve and so forth in a log so that his net scale figure is supposed to report in the recoverable merchantable lumber that is going to come out of that log?

“A. He is supposed to report where the three and better comes out.

“Q. And scaling logs by the accepted method of scaling is relatively an exact science, isn’t it, Mr. Dare? By that I mean this: Two competent scalers scaling a given number of logs generally come out very close together on what the net scale is, don’t they? A. Fairly close, yes.

“Q. Within, say, a maximum of five per cent, wouldn’t that be a fair statement?

(Deposition of Dan Dare.)

“A. They should, yes.

“Q. So that if two competent scalers scaled a million feet of logs, they should be within fifty thousand feet of each other, generally speaking, as to what the net content is, shouldn't they? [153]

“A. Ordinarily they would be, yes.

“Mr. Goodwin: Thank you.

“Redirect Examination

“By Mr. Hilger:

“Q. You have stated that the theory of these deductions in scaling is that the mill should recover in lumber the number of feet of logs for which it pays when it buys logs?

“A. What's that, again?

“Q. To put it another way, if a mill purchased a net scale after deductions of a million feet of logs, theoretically it should get a million feet of lumber recovered out of that?

“A. Theoretically, yes.

“Q. If they recovered one hundred and fifty—rather, a million and a half feet of lumber out of logs that had a net scale of only a million feet, it would indicate that there was too much deduction by the scaler of the logs?

“A. That would depend a whole lot on the mill.

“Q. Well, you stated that the theory was that the net log scale should equal the lumber scale?

“A. Not exactly. Your mill is entitled to an overrun.

(Deposition of Dan Dare.)

“Q. How much, approximately what per cent?

“A. Every mill is different. You take a stud mill, it will go twenty per cent sometimes. I don’t know [154] what your gang mill will go. I don’t know your dimension mill will go. All I know is what different people have told me.

“Q. From your knowledge of the lumber industry would you say that a stud mill would get more overrun than a dimension mill or less?

“A. It would get more overrun than a dimension, but it shouldn’t get any more than a gang mill, I don’t think. I don’t know.

“Mr. Hilger: That is all.

“Recross-Examination

“By Mr. Goodwin:

“Q. Mr. Dare, from your experience in the lumber industry, isn’t it a fact that a gang mill generally is supposed to get a greater overrun than any other type of sawmill?

“A. I couldn’t say.

“Q. You don’t know. But it is your information that a gang mill—your general understanding that a gang mill should have an overrun as great as a stud mill? A. Should be, yes.

“Q. You say that from your experience a stud mill is apt to run at a twenty per cent overrun. That’s not unusual, is it?

“A. Go between fifteen and twenty, yes, sir.

“Mr. Goodwin: Thank you, very much, sir.”

(Deposition of Dan Dare.)

“Mr. Hilger: That is all. One more question I [155] would like to ask before he goes. You can answer from there, if you want to. You worked for Western Studs from 1951 until November of '56 as a log buyer? A. That's right.

“Q. At no time during that period did you work for the Vander Jacks? A. No.

“Q. In any capacity? A. No.

“Q. And you do not now work for them, do you? A. No.

“Q. You're now working for Gualala Lumber Company? A. Yes.

“Q. That belongs to Mr. Hoskins, I guess?

“A. That's right.

“Q. Vander Jacks don't have any interest in it?

“A. Not that I know of.”

Mr. Hilger: I would like to read in evidence at this time the deposition of Benjamin Dare, taken in Eureka, California, on Thursday, November 29, 1956.

The Referee: Proceed.

DEPOSITION OF BENJAMIN A. DARE

Mr. Hilger (Reading): “Would you state your name for the record?

“A. Benjamin A. Dare.

“Q. And where do you reside, Mr. Dare?

“A. 1383 J Street, Arcata.

“Q. What is your trade or occupation, Mr. Dare?

(Deposition of Benjamin A. Dare.)

“A. Well, Logging Manager at the Alton Stud and Cross [156] Arm at the moment.

“Q. Have you been a log buyer at any time?

“A. For numerous years, yes, Sound Lumber Company.

“Q. Would that be in Arcata? A. Yes.

“Q. Were you so employed during the summer and fall of 1953? A. Yes; I was.

“Q. And that was as log buyer at Sound Lumber Company? A. Correct.

“Q. Now, is that a dimension mill?

“A. Yes.

“Q. Did you, on behalf of Sound Lumber Company, in the summer of 1953, buy any logs from Snow Camp Logging Company or Vander Jacks?

“A. Yes; we did.

“Q. Those come from their timber show in the Redwood Creek area? A. Yes; they did.

“Q. On what basis did you buy those logs?

“A. Camp run. I don't know the exact price. I think it was forty-eight dollars a thousand.”

The Referee: Pardon me. “Camp run,” what is the definition of that? The same as run-of-the-mill?

Mr. Hilger: That is correct. You take them as you find them. (Continuing reading:)

“Q. That is on a camp run basis?

“A. Yes.

“Q. Now, during the summer and fall of '53 were you ever up in the Redwood Creek area?

(Deposition of Benjamin A. Dare.)

“A. Well, numerous times; not in this specific logging [157] operation.

“Q. But you were up there in that area on numerous occasions? A. Yes.

“Q. Did you ever have occasion to go to the Peters mill or the Timber, Incorporated, mill there? A. Numerous times, yes.

“Q. What was the purpose of your visits there?

“A. Well, two of my visits were to buy some peeler logs that he had decked around his pond.

“Q. He had peeler logs decked around his pond?

“A. That's right, butts that he had taken off of some of his logs.

“Q. He was selling those to you as his logs or of Timber Incorporated logs?

“A. He made a tentative deal to sell them to me, but he never sold them to me. I think they went to Arcata Plywood.

“Q. They were represented, however, to be his logs or the logs of Timber Incorporated?

“A. That's right.

“Q. Did you observe when you were there any logs in the pond at the mill?

“A. Well, the pond was full, yes.

“Q. How would you describe the logs that were in the pond, Mr. Dare?

“A. Well, about the same as you would find in any pond we was buying camp run. [158]

“Q. Were they the same type as you got at Sound Lumber?

(Deposition of Benjamin A. Dare.)

“A. Well, they were the same type, other than the fact that most of the logs that I bought were larger. I tried to buy bigger logs primarily, except in some cases I might buy small logs that he had there for timbers, when we had timber orders.

“Q. His logs were smaller than the ones you got? A. On a general run, yes.

“Q. And the logs that you purchased were satisfactory camp run logs?

“A. Uh-huh, they were. There was some bad ones, of course. You will find that in any gyppo outfit.

“Q. Would a camp run type of delivery contain from time to time any cull logs?

“A. Oh, yes. Any logging show I ever bought logs did have.

“Q. Camp run would include some cull logs?

“A. Well, you always hope they don't but then invariably you get some.

“Q. And would a camp run type of delivery also include logs that would be, say, good for a part of their length and cull for the remainder of their length? A. Very possibly, yes.

“Q. And what is the practice in connection with the using of that kind of log? [159]

“A. Well, lots of times in our own logging shows, for instance, why, we might run into a problem of loading or something like that and rather than maybe cut a log, why, we would go ahead and send a fifty per cent log in because we wanted one end of it. One end we might make a

(Deposition of Benjamin A. Dare.)

peeler and the other end might be a cull, and the other might be a cull and the other end might be a number two log."

Mr. Stark: Does a log have four ends?

Mr. Hilger (Continuing reading): "Q. When that arrives at the pond and is taken into the mill for manufacture, what happens to the culled end of it? A. Well, we throw it away.

"Q. It's sawed off of the good end?

"A. Sawed off and left in the pond, and, usually, we burn them or run them through the mill and try to recover something out of it.

"Q. And as a cull log—I will rephrase that. If a cull log should be included in the delivery of logs and dumped into the pond, that would be pushed to one side and the good logs taken and the cull log left?

"A. Well, we didn't always do that there at Sound. There's different practices at different mills, but sometimes we wouldn't let our pile up, because we run it on there and put them in the burner because you can collect a lot of them in a little [160] while.

"Q. In an operation that big, over the course of a year's or so operation, if the cull logs were not cleaned from the pond there would be—would there be many of them, presuming that you had a camp run type of supply?

A. Well, it would be pretty hard to determine any exact amount, but it would run—well, our pond

(Deposition of Benjamin A. Dare.)

there would have been full probably of culls if we let it go for a whole year.

“Q. How much does your pond hold?

“A. About two and a half million.

“Q. So if those culls were not cleaned out and they were allowed to accumulate in the pond over a year's operation, the pond would be pretty well loaded down with them?

“A. That's right. Now, I don't know what your definition of a cull is, but anything over fifty per cent is termed, according to your log scaling and grading rules, as a cull.

“Q. But——

“A. (Interrupting): That's changed a little bit in the last two years.

“Q. But in 1953——

“A. (Interrupting): That's what the rule read then, that's right.

“Q. If such a log were scaled, would the defective part be deducted from the total footage in determining [161] the net scale?

“A. No; it would be just cull.

“Q. In other words, the mill would not be charged anything for that cull log?

“A. That's right.

“Mr. Hilger: That is all.

(Deposition of Benjamin A. Dare.)

“Cross-Examination

“By Mr. Goodwin:

“Q. Mr. Dare, you have no personal knowledge of how the logs were scaled there at Mr. Peters’ mill as far as their content or their recovery, do you, sir?

“A. No. Anything I would say would just be what I heard.

“Q. Just be hearsay, as far as you’re concerned? A. That’s right.

“Q. You didn’t participate in the scaling or have any direct knowledge of it? A. No.

“Q. You have no personal knowledge of the volume of cull logs that was delivered by Mr. Vander Jack to Mr. Peters’ mill, do you?

“A. No; I don’t.

“Q. You have no personal knowledge of the quantity of number three logs that were delivered to Mr. Peters’ mill?

“A. No; that would be a guess, also.

“Q. You have no personal knowledge of what the ratio was between number two logs and number three logs volumewise?

“A. I could answer [162] it this way: We got a considerable amount of number three’s that we bought from him, but they were for size, primarily small timber. Now, anything under twelve inches automatically is classified as number three log, and he had some stuff that was pretty smooth and we

(Deposition of Benjamin A. Dare.)

would take it anyhow. I don't know what their practice was, but I imagine it was the same. Most mills——

“Q. (Interrupting): At your own purchases from Mr. Vander Jack any log less than twelve inches on the small end was automatically classified as number three log?

“A. That's right, but at the particular time I don't think—I'm sure that we weren't grading. I don't think we started grading until 1954.

“Q. You don't believe that you were grading in '53?

“A. Not if my memory is as good as I think it is.

“Q. But as far as these matters that I have just spoken to you, et cetera, as to the percentage of number three's, either because of size or because of grade, that were delivered to Mr. Peters' mill, you don't know? A. No; I don't.

“Q. And what the recovery was of the logs, you don't know, do you, sir? A. No.

“Q. You did not inspect any of the logs at Mr. Peters' mill for grade?

“A. No. The only time I ever seen his logs was just two times that I [163] went there to look at these peeler logs.

“Q. On two occasions you were at the mill you observed the pond full or relatively full of logs and they appeared to be of an average grade?

“A. That's right.

“Q. That was from just looking at the logs in

(Deposition of Benjamin A. Dare.)

the water? A. That's right.

“Q. So that you didn't make any detailed inspection of them? A. No.

“Q. To arrive at any conclusion of your own as to the over-all grade of the logs would have required either a grading on your part or a detailed inspection of them, would it not?

“A. Well, it would have required someone to go and examine them. If I was going to buy, I would examine them.

“Q. You would go and turn them over and look them over?

“A. That's right. I can tell by glancing at the pond what kind of a log you have, because the conky ones come up.”

The Referee: What is that?

Mr. Hilger: It is a form of parasitic growth, a defect in the log, in other words (continuing reading):

“Q. It will turn up if there's conk in the log?

“A. Invariably, yes.

“Q. And again your general impression was from the [164] two visits you were there that the logs were of average camp run quality?

“A. That's right.

“Mr. Goodwin: Thank you.

“Mr. Hilger: Thank you, sir.”

The Referee: One other definition let's get into the record. What's a gyppo truck?

Mr. Hilger: A gyppo is an independent contractor that provides various services in logging.

(Deposition of Benjamin A. Dare.)

It would include his own equipment or machinery; or a gyppo trucker is one who owns his own truck and either drives it himself or hires it done and hauls for so much a thousand board feet.

Mr. Margolis: It does not have an unsavory meaning.

Mr. Hilger: No; it is the standard description for that type of truck.

Mr. Goodwin: It is usually applied to a small operator running on a subcontract. It might be a man who owns his own logging truck. He may have a little tractor and does the loading of the logs.

The Referee: I see. I thought it should be cleared up in the record so we would all have the same idea of it.

Mr. Hilger: At this time I would like to read into evidence the deposition of Harry O'Rourke, taken at Crescent City, California, on Thursday, the 1st day of November, 1956.

The Referee: Proceed.

DEPOSITION OF HARRY O'ROURKE

Mr. Hilger (Reading): "Q. Will you state your name, please?

"A. Harry O'Rourke. [165]

"Q. Where do you reside, Mr. O'Rourke?

"A. In Crescent City.

"Q. That is Crescent City, Del Norte County, California? A. That is correct.

"Q. Referring to the summer of 1953, what was your occupation at that time?

(Deposition of Harry O'Rourke.)

"A. I was mill superintendent for Timber Incorporated at Redwood Creek.

"Q. And you worked for them, you were their employee? A. Yes.

"Q. How long did you occupy that position?

"A. About fourteen months, from the time the mill started till August of 1953.

"Q. And you did leave that employment in August of 1953? A. Beg your pardon?

"Q. Did you leave that employment in August of 1953?

"A. Yes. I left Redwood Creek on the 17th of August. I was paid for the month of August but I was relieved of all authority there, I believe it was on the first Sunday or probably the second Sunday. Anyhow, it was in the first half of August I was relieved and another man came in to take my place as superintendent. But I had to stay there until the Lawrence Warehouse representative came down and cleared me out. I left there on the 17th of August and moved to Crescent City then. [166]

"Q. During your period of employment with Timber Incorporated you were around the Redwood Creek mill regularly in connection with your duties as mill superintendent?

"A. That is right.

"Q. And you had, of course, opportunity to observe the operation of the mill up to August 17, 1953? A. That is right.

(Deposition of Harry O'Rourke.)

"Q. During that period were there sufficient logs delivered to the mill to keep it in operation?

"A. Yes, sir; for two shifts.

"Q. And what type logs were those?

"A. They was the average run of gang logs. There were some good ones and some weren't so good, but what we would call an average run of gang logs.

"Q. Who delivered those logs to Timber Incorporated, do you know?

"A. Snow Camp Logging Company.

"Q. That would be the Vander Jacks?

"A. That is right.

"Q. While you were there did you observe any other trucks or logging trucks other than the Vander Jack trucks taking logs there to the mill?

"A. I think I do but I wouldn't go on record as saying who they were because I don't remember.

"Q. All you know is they were not Vander Jack trucks?

"A. Occasionally there was other trucks come in there [167] but not many of them during my period of employment there, but there was a few. My own opinion was they were under contract to Snow Camp, to Vander Jack, but I don't know that.

"Q. All you do know is that they were not Vander Jack trucks?

"A. Yes, and I wouldn't say how many there were because I don't remember.

"Q. But there were some?

(Deposition of Harry O'Rourke.)

"A. There were some, yes.

"Mr. Hilger: That is all.

"Examination

"By Mr. Cissna:

"Q. Were there two shifts operating at the mill during all the time you were there, Mr. O'Rourke?

"A. Well, we started up, I believe it was in June of 1952 and I think the second shift went on in July and they both run continuously then excepting in the flood we had up there, when both shifts were down about a week. But other than that both shifts were in operation all the time.

"Q. You actually left your job then on the 1st of August but were paid——

"A. No. I believe it was the first week. It was on a Sunday, anyhow, that old S. A. himself come up there and told me they weren't satisfied with the production they were getting and he was getting an experienced gang man up there to take over and I was relieved. [168] But I was to be paid until the 1st of September, paid for the month of August, because I was warehouse manager there.

"Q. What I am trying to find out is when did you leave—August 1st or the Sunday after August 1st?

"A. The Sunday after August 1st, whatever that was, in 1953.

"Q. You say they were a type of logs that were average run gang logs, were they?

(Deposition of Harry O'Rourke.)

"A. No; you couldn't say that, because when you are running a gang mill you can't have great big logs. A gang won't take them. That was a 36-inch gang and most of the logs—there were some there a little too large but I don't know how many of them there were. Gang logs is not a woods-run log because for a big sawmill——

"Q. Except for size, were these the average run woods log, do you know?

"A. As far as I know they were, yes. I think they were.

"Q. The quality of the logs were generally poor, though, were they not? Isn't that true?

"A. No; I wouldn't say that. We had some good logs and some poor logs.

"Mr. Cissna: That is all.

"Further Examination

"By Mr. Hilger:

"Q. While your duties as mill superintendent were [169] terminated the 1st week in August, I believe you stated you also had the job of warehouse manager for Lawrence Field Warehouse Company? A. That is right.

"Q. Then that duty required you to stay there at the mill until you were relieved of that duty?

"A. That is right, of that duty only. I had nothing to do with the mill then.

"Q. And you were still there on the premises, you said, until August 17th?

(Deposition of Harry O'Rourke.)

"A. That is correct, until August 17th.

"Q. You were operating two shifts a day at that time?

"A. They were operating two shifts when I left there.

"Q. Do you know what the monthly production was during, say, June, July and August of 1953?

"A. Oh, it was right around three million feet.

"Q. A month? A. Yes.

"Q. Three million feet a month?

"A. Um-hum.

"Mr. Hilger: That is all.

"Mr. Cissna: That is all."

Mr. Hilger: At this time I would like to read into evidence the deposition of Ray Slobig, taken at Crescent City, California, on November 1, 1956.

The Referee: Proceed:

DEPOSITION OF RAY SLOBIG

Mr. Hilger (Reading): "Q. Would you state your name, please? A. Pardon? [170]

"Q. Will you state your name, please?

"A. Ray Slobig.

"Q. And where do you reside, Mr. Slobig?

"A. Crescent City.

"Q. That is in Del Norte County, California?

"A. Yes.

"Q. Referring to the summer of 1953, where were you employed?

"A. Well, until approximately the 1st of Au-

(Deposition of Ray Slobig.)

gust, I worked for Timber Incorporated in Humboldt County.

“Q. Is that at their Redwood Creek mill?

“A. Yeah.

“Q. What were your duties there or what was your job?

“A. Well, I guess you’d classify me as a general maintenance—in the maintenance work outside and some millwrighting in the mill.

“Q. In connection with the performance of those duties were you around and about the mill regularly? A. Oh, yes.

“Q. And that was during work hours?

“A. Um-hum.

“Q. Was the mill operating regularly at that time?

“A. Yes; every day, almost every day, unless it was broken down and we tried to keep it from breaking down as much as possible.

“Q. Were there sufficient logs there at all times to [171] keep the mill going? A. Oh, yes.

“Q. Do you know anything about the quality of those logs?

“A. Oh, I guess they would be classed as average. Some weren’t very good and we did get a bunch of logs that were too big for running through the gang mill, big and knotty.

“Q. The capacity of your mill was a 36-inch log, is that about right?

“A. Yes; that was the capacity, all she’d handle.

(Deposition of Ray Slobig.)

“Q. Do you know who was delivering logs to that mill at that time?

“A. Well, as I understand, Vander Jack or Snow Camp Logging Company was delivering the logs.

“Q. While you were there did you observe any other trucks other than Vander Jack trucks delivering logs at that mill?

“A. I have saw some other trucks drive in there but I don't know, don't remember whether they delivered logs or not. I remember particularly one truck come through around by the dump and went around, and I wondered why he did that, but that one didn't dump any logs.

“Q. But other trucks did pull in there, is that right?

“A. I saw some other trucks in there but who they belonged to I don't know, or who they worked for. But I can't remember whether they dumped any logs or not. That is another thing I have [172] been trying to get straight in my head.

“Q. Do you recall whether or not they were loaded with logs?

“A. Yes; some were loaded with logs and others came in there empty.

“Q. But some did come in there loaded that were not Vander Jack's, is that right?

“A. Yes; as I remember.

(Deposition of Ray Slobig.)

“Examination

“By Mr. Cissna:

“Q. What were your duties, Mr. Slobig? Were you on the green chain during this mill operation?

“A. No. I did work, I think, for two weeks on the green chain the last two weeks I was there.

“Q. You had no supervisory capacity, did you?

“A. The last year I was there?

“Q. Yes.

“A. No; I wouldn't say I did. General maintenance was all.

“Q. It is only from your general observation of the running of the mill that you say there were sufficient logs present, is that right? A. Yes.

“Q. Did you have an opportunity to observe the quality of these logs as they were cut, close? Were you at the cutting of these logs?

“A. Well, no. I wasn't around the mill too much of the time. In other words, I wasn't in the mill all day long. Maybe I'd be in the mill for an hour or half hour, something like that, during the day. [173]

“Q. But you did observe that the logs were of a general poor quality, is that correct?

“A. Well, I'd say they were about average, about average grade, I guess. Well, you couldn't get peeler logs and these small logs like that for a gang mill. You don't get very many peelers.

“Q. They were all smaller logs for the gang

(Deposition of Ray Slobig.)

mill but not of the upper grade small logs, is that correct?

“A. That is kinda putting me on the spot because I’m not a log grader or scaler and I wouldn’t know about that.

“Q. Going back to the other log trucks, you don’t know whether any other log trucks dumped logs in there or not, is that your answer?

“A. I can’t say they actually dumped logs. I have seen log trucks coming in there but whether they actually dumped or not, I couldn’t swear to that.

“Q. If another truck did come in there that wasn’t a Vander Jack truck, you don’t know whether he was in there for Vander Jack or somebody else?

“A. No; I don’t know who he was in there for or anything like that.”

Mr. Hilger: I would like at this time to read into evidence the deposition of Merle Montgomery, taken at Eureka, California, on November 29, 1956.

The Referee: Proceed. [174]

DEPOSITION OF MERLE MONTGOMERY

Mr. Hilger (Reading): “Q. Would you state your name, please? A. Merle Montgomery.

“Q. And where do you reside, Mr. Montgomery?

“A. I live on Warren Creek. That’s a few miles out of Arcata, about five miles.

“Q. That is in Humboldt County, California?

(Deposition of Merle Montgomery.)

"A. That is.

"Q. What is your trade or occupation?

"A. Well, I have been a log scaler and log buyer for quite a number of years.

"Q. Fifteen years?

"A. About fifteen years, yes.

"Q. How long have you been doing that type of work in Humboldt County?

"A. Almost five years.

"Q. Referring to the summer of 1953 were you scaling logs at that time?

"A. I was scaling for Snow Camp and Timber Incorporated at the Redwood Creek pond there.

"Q. What do you mean, you were scaling for both of them?

"A. Well, I was hired by both of them, mutual agreement. I got my checks from Timber Incorporated.

"Q. You were paid by Timber Incorporated?

"A. Hank Welch used to bring out my checks to me.

"Q. Hank Welsh was the Manager of Timber Incorporated? [175] A. That's right.

"Q. During the summer of '53 was he replaced by someone else?

"A. Ted Green took over. I don't know—I don't know exactly when.

"Q. When did you—well, to get back to the start of the thing. Where did you perform this scaling during the summer of '53?

(Deposition of Merle Montgomery.)

“A. At the scaling ramp right there by the dump.

“Q. At the mill? A. Yes; at the mill.

“Q. That is next to the pond?

“A. Yes; next to the pond.

“Q. And as scaler did you have an opportunity to observe the type of logs that was being delivered to the mill that summer?

“A. Yes. They bought the logs on my scale.

“Q. And you examined them or your assistant, Mr. Hershey, did for the purpose of scaling them?

“A. That's right.

“Q. Those logs were delivered by Snow Camp Logging Company, I presume?

“A. All of them, practically.

“Q. In your capacity as scaler you were familiar with the log grading standards in the area at that time?

“A. That's right, but there was no grade to those logs. They was bought on a camp run basis to be adapted to that mill. [176]

“Q. But you were familiar with the log grading practices? A. Sure.

“Q. You would describe these, then, as camp run?

“A. Camp run and type of logs that mill could use, being a gang mill with a thirty-five-inch opening.

“Q. In other words, the maximum size log would be around thirty-five inches?

(Deposition of Merle Montgomery.)

“A. That’s the biggest they could take in the mill.

“Q. Would you describe the quality of the logs as poor, average or superior, having regard to the type of log that was being delivered?

“A. I’d say they was average logs of the type—they were second growth, small second growth timber with small knots.

“Q. Now, then, in these deliveries were there any cull logs? A. Oh, sure.

“Q. Is there usually cull logs——

“A. (Interrupting): You’re bound to——

“Q. (Continuing): ——in camp run deliveries?

“A. (Continuing): ——unless you have a qualified scaler on the landing and even then in the mud and the way you’re working, you’d get cull logs. Anybody gets cull logs now and then or they’re not logging clean.

“Q. Those would be loaded on the truck when it came up for your scaling?

“A. They’d be mixed up right in the logs, [177] yes.

“Q. Now, when you came across a cull log on one of these loads, how would you scale it?

“A. I’d cull it.

“Q. That means you would charge no scale for that?

“A. Well, I’d just write ‘cull’ behind it and when they got it to the office there would be no bill made out for it.

(Deposition of Merle Montgomery.)

“Q. In other words, so far as a charge for that log, there would be no charge made by the logger?

“A. That’s right. In your scaling you try to—a lot of it is left to the scaler’s judgment. At times you have to take a log that is defective in more than one way. You have to figure out whether the mill can recover anything out of it according to the amount of labor they put into it. Now, if a log wouldn’t cut out a sufficient quantity to pay them a profit for handling it, well, you have got a cull.

“Q. Then you, on your scale sheet do you write after that log ‘cull’? A. That’s right.

“Q. And no charge for any footage is made?

“A. That’s right.

“Q. Now, these logs were unloaded at a pond dump, is that correct? A. That’s right.

“Q. How do you unload a truck at a pond dump, Mr. Montgomery?

“A. Well, you put the dump straps under the load, hook them to the A frame [178] and tighten them up and take the binders off and roll them off in one body into the water.

“Q. So that if a load of logs arrived at the mill with a cull log on it, that cull would be unloaded all at the same time with the rest of the logs?

“A. Unless there was a peaker log, you couldn’t do nothing else with it.

“Q. It would have to be unloaded into the pond right along with the other logs?

“A. That’s right.

“Q. Now, then, you were there at the dump

(Deposition of Merle Montgomery.)

during the working hours of this particular mill, were you not?

“A. At the time I was there I scaled every log that went into it, practically, I or Harry, and I overseen him. I checked most everything he done.

“Q. You had an opportunity to observe the manner in which the pond was operated by the Peters mill? A. That’s right.

“Q. Now, you have explained how a cull log would be delivered and how it would be unloaded into the pond. Once that cull log was in the pond, would it be run through the mill, or how would it be handled?

“A. Sometimes they would run them on through and sometimes some of the stuff they would push back.

“Q. Some of the cull logs?

“A. Some of the cull logs they would push back, especially if it [179] was a cull log or if one end was too big for the mill. They had quite a collection of oversized blocks that was bucked off of logs that they was too big to run. The ends of them was too big to run, that is, the taper in the tree.

“Q. And did they have a collection there in the fall of ’53 of cull ends and low grade ends that they had sawed off?

“A. Oh, yes, quite a lot of them.

“Q. Those were still in the pond?

“A. Some of them were still in the pond and some were in the bank at the end of the pond.

(Deposition of Merle Montgomery.)

“Q. You left the pond there with your scaling some time in October of '53, is that right?

“A. Yes.

“Q. At that time was there quite a collection of this low-grade material in the pond and around it?

“A. I know there was quite a lot of it. How much, I wouldn't be able to tell you. I had to scale everything in the water and around there the first of every month for inventory.

“Q. That was for inventory purposes for the Peters mill? A. Yes.

“Q. And you had occasion to count those cull logs and those low-grade logs?

“A. I scaled them the first of every [180] month.

“Q. About the time you left there in October was there many of that type of logs in the pond?

“A. Quite a few.

“Q. Now, then, the day that you left your duties there at the pond as scaler, what caused you to leave? A. Well, Mr. Green came up and——

“Q. (Interrupting): Who is Mr. Green?

“A. He was Superintendent of the mill.

“Q. For Peters?

“A. For Peters. He told me that I was no longer needed, or words to that effect. I don't know what the exact words were. So we scaled the first few loads. He brought another scaler out there. We scaled these first loads and the other scaler scaled them also, and then they called in and got ahold of Vander Jack. When he came out, why, he

(Deposition of Merle Montgomery.)

moved Harry and I down the road to where we could catch the loads coming to town and we continued to scale for the mills in town from then on.

“Q. From the time you went up scaling those logs at the landing up the hill for the mills in town, you were no longer employed there by Timber Incorporated and the Vander Jacks?

“A. That’s right. Well, Vander Jack——

“Q. (Interrupting): You were employed thereafter by Vander Jack?

“A. I was still a Bureau man working for the Bureau, but Vander Jack paid me. [181]

“Q. Thereafter? A. Yes.

“Q. Prior to that time you had received your checks from Timber Incorporated?

“A. Well, that’s a question in my mind. There was someplace in there that was a breaking point on that. It seems to me, as I remember it, that after Hank went there I started—no, that’s right, Peters gave me the last check himself up in the office, that’s right.

“Q. You mentioned something about the Bureau. What is the Bureau?

“A. Well, there was the Humboldt Bay Scaling Bureau here at that time.

“Q. What does a scaling bureau do?

“A. They was a licensed bureau and was qualified to scale and grade logs.

“Q. Was their function to provide qualified certified scalers for mills and logging operations?

“A. That’s right.

(Deposition of Merle Montgomery.)

“Q. Were you qualified and certified in that Bureau?

“A. Yes. At the same time I was scaling there on the pond on that ramp, loads would come in on one side to Peters’ pond and loads would come in on the other side and I’d send them to McIntosh or to Western Studs or to Al Thrasher Lumber Company, various mills, Sound Lumber Company. They went to all different mills, whoever Bud happened to be selling at that time stuff that was too big for Peters. [182]

“Mr. Hilger: That is all.

“Cross-Examination

“By Mr. Goodwin:

“Q. Mr. Montgomery, you were a scaler for the Humboldt Bay Log Scaling and Grading Bureau, weren’t you? A. That’s right.

“Q. Isn’t it a fact that Mr. Vander Jack owned that Bureau?

“A. Not to my knowledge. I never did know.

“Q. You don’t know whether he did or did not? A. I don’t know nothing about that.

“Q. I see. Now, when you were up there during the summer and fall of 1953 you scaled not only the logs that went to the Timber Incorporated mill, but also the logs that went to town?

“A. That’s right.

“Q. Now, during that period of time Mr. Van-

(Deposition of Merle Montgomery.)

der Jack shipped logs that were of a size to be gang logs to town as well as to Peters' mill, didn't he?

"A. Well, primarily they were bunk logs under larger logs.

"Q. But they were—gang logs were sent to town, were they not, sir, regularly?

"A. On straight loads you mean?

"Q. Yes. A. I'm—not very many. [183]

"Q. Not very many. Most of the gang logs were bunk logs?

"A. Bunk logs under stuff that was too big for that mill to saw, or peeler loads.

"Q. A load of peelers? A. Yes, sir.

"Q. Number three peelers were sent to town that were of a size that could also be used as a gang log, weren't they?

"A. That had to have bunk logs for the bigger ones.

"Q. Isn't it a fact that, generally speaking, the quality of the logs that went to town were better than those that went to Mr. Peters?

"A. I wouldn't say that, sir.

"Q. You wouldn't say that?

"A. No. It depends on what the mills were adapted to. There was mills that got a worse grade of logs for their own use than Peters did.

"Q. Such as?

"A. Well, Thrasher Lumber Company got mainly large rough logs.

"Q. Of course, he was running a stud mill, wasn't he?

(Deposition of Merle Montgomery.)

“A. Stud logs—rough logs are not to make studs out of. You can’t put over a two-inch knot in a two-by-four.

“Q. Was Thrasher buying on grade?

“A. No.

“Q. He wasn’t. Now, when you moved your scale shack up the road, that was at the instruction of Mr. Vander Jack, wasn’t it?

“A. That’s right. [184]

“Q. As a matter of fact, he intended to move you up there anyway, did he not?

“A. He never told me that.

“Q. Wasn’t a new road completed about that time where it was more advantageous to have the scaling shack up the road than at the mill?

“A. No, sir, I don’t think so.

“Q. Well, are you sure about that?

“A. I’m sure. Where he moved me was up at the county road at the foot of the hill across from the ranch.

“Q. Would you say that was the same time that he started delivering all the logs to town?

“A. Yes, sir, well, seems like to me that they took a few more into the mill, but I can’t remember.

“Q. It was approximately the same time?

“A. Approximately the same time.

“Q. All right. When you moved up the road it was more advantageous to be up there for town logs than it was to be at Peters mill, wasn’t it?

“A. Well, you see, there was stuff still coming

(Deposition of Merle Montgomery.)

past the mill, loads of logs, I mean, that I was scaling there that I could have caught just as easily at the mill, but there was one side a short time after that—I don't know whether this happened that way or what, but there was one that did come up above the mill that would have had to double back to the mill. [185]

“Q. Well——

“A. (Int'g) But there had been loads that had done that before.

“Q. Well, Mr. Montgomery, assuming that all of the logs were going to be delivered to town, all of them, you would not have had your scale shack at Peters' mill, would you?

“A. Well, I can explain that to you. I was working there at the mill scaling for Peters and Vander Jack and there was one or two other mills that were in town that asked Mr. Vander Jack if he would run them logs back there and have me scale them so that they could buy them from him with my scale on them.

“Q. Well, apparently you don't understand my question. Let's assume that no logs were to be delivered to the Vander Jack—to Timber Incorporated mill by Mr. Vander Jack and that all of his production was to go to the Arcata area. Assuming those facts to be true, you would not then have your scale shack at the Timber Incorporated mill, would you? A. That's true.

“Q. You would have it up on the road or about where you did end up with it, isn't that about

(Deposition of Merle Montgomery.)

where it would be? A. That's true.

“Q. About the same time that the scale shack was moved, approximately the same time the scale shack [186] was moved, no further log deliveries were made to the Timber Incorporated mill by Mr. Vander Jack?

“A. Short time after that, yes.

“Q. With reference to this scaler that was brought on the job by Timber Incorporated, you were advised, were you not, that he was there for the purpose of being a check scaler?

“A. They just told me that they didn't need me any more.

“Q. Didn't they tell you that he was only a check scaler? A. Not as I recall.

“Q. Well, Mr. Montgomery, clear up until deliveries were stopped, billing was made and payment was made entirely on the basis of your scale, wasn't it? A. I wouldn't know about that.

“Q. You don't know about that?

“A. That would come out of the office.

“Q. You were never advised one way or the other? A. That's true.

“Q. But it's entirely possible that Mr. Green told you that this man was a check scaler, wasn't it?

“A. No one. He said they didn't need us to scale those logs any more, Hershey——

“Q. (Int'g) Mr. Green told you that?

“A. That this man was going to scale them,

(Deposition of Merle Montgomery.)

that's true, so I took it upon myself to scale the first load or two or three that came through until I got [187] some word from Mr. Vander Jack.

"Q. And Mr. Vander Jack came to you and said, 'Move the scale shack up to the road'?

"A. That's right.

"Q. Isn't that right? A. That's right.

"Q. And you moved the scale shack up the road because Mr. Vander Jack told you to?

"A. That's true. I had to work for somebody, Mr. Goodwin, I didn't know just who.

"Q. At that time your wages were being paid at all times? As a matter of fact, your wages were being paid by both sides?

"A. Both sides—when one party told me I was through, I'd rather work for the other one or I'd be looking for a job.

"Q. You never discussed that with Mr. Peters?

"A. No, I never did.

"Q. Mr. Peters never told you that he didn't want you to scale any more?

"A. Not at that time, no.

"Q. He was—he was the head man at Timber Incorporated, wasn't he?

"A. He was. I never did have any dealings with Mr. Peters. I always worked for Mr. Welch. Then I took my orders from Mr. Green after Mr. Welch left.

"Q. How long was the new scaler there on the job before you moved the scale shack?

"A. Oh, I'd say three, four hours. [188]

(Deposition of Merle Montgomery.)

“Q. You mean you moved the same day he showed up? A. Yes, sir.

“Q. Mr. Vander Jack told you, did he not, Mr. Montgomery, that he objected to this check scaler being there?

“A. I don't know whether he told me that or not. I really couldn't tell you.

“Q. You don't remember? A. No, sir.

“Q. You're quite sure that this check scaler, this new scaler, was only there just a few hours before you moved?

“A. As I remember it, he wasn't there very long.

“Q. As a matter of fact, he was there a couple of weeks, wasn't he? A. No, sir.

“Q. You're sure of that?

“A. Not scaling like that, no, not after Mr. Green notified me.

“Q. Well, I mean from the time he showed up starting to check the logs.

“A. He worked there around before that, but Mr. Green had never told me to leave.

“Q. Mr. Green didn't tell you to leave, did he?

“A. Well, he told me I didn't need to scale logs any more.

“Q. Mr. Green told you you didn't have to scale any logs? A. For them, yes.

“Q. You're sure of that?

“A. Yes, sir. [189]

“Q. At some particular period of time both you and the Timber Incorporated scaler were scaling

(Deposition of Merle Montgomery.)

the same log? A. That's true.

“Q. That scaler's name was Dick Knowland, wasn't it? A. I don't know who he was.

“Q. You don't remember? A. No, sir.

“Q. You didn't know him? A. No, sir.

“Q. You know what Bureau, if any, he was with?

“A. I don't believe he was with a Bureau.

“Q. There was another Bureau, Scaling Bureau, in operation at that time?

“A. Yes, sir.

“Q. And that was known as the Northern California Log Scaling and Grading Bureau?

“A. That's right. Mr. Goodwin, Can I ask you something?

“Mr. Hilger: You want that on the record——

“The Witness (Int'g): Just hold it off of there.

“Mr. Hilger: (Cont'g): ——or off the record?

“The Witness: I think that man worked around there for awhile and maybe they said he was check scaling, but he would walk around a load and look at it and then dump it in the water. I don't understand what kind of check scaling that would be.

“Mr. Goodwin: Well, in other words, you saw him around there?

“A. Yes. [190]

“Q. You didn't pay much attention to him for awhile?

“A. I thought he was running a dump, dumping the loads, which he did.

No. 16322

United States
Court of Appeals
For the Ninth Circuit

S. A. PETERS and TIMBER, INC., of CALI-
FORIA,

Appellants.

vs.

KAL W. LINE, Trustee in Bankruptcy of the
Estate of Snow Camp Logging Co., Bankrupt,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 271 to 553)

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

FILED

MAY -5 1959

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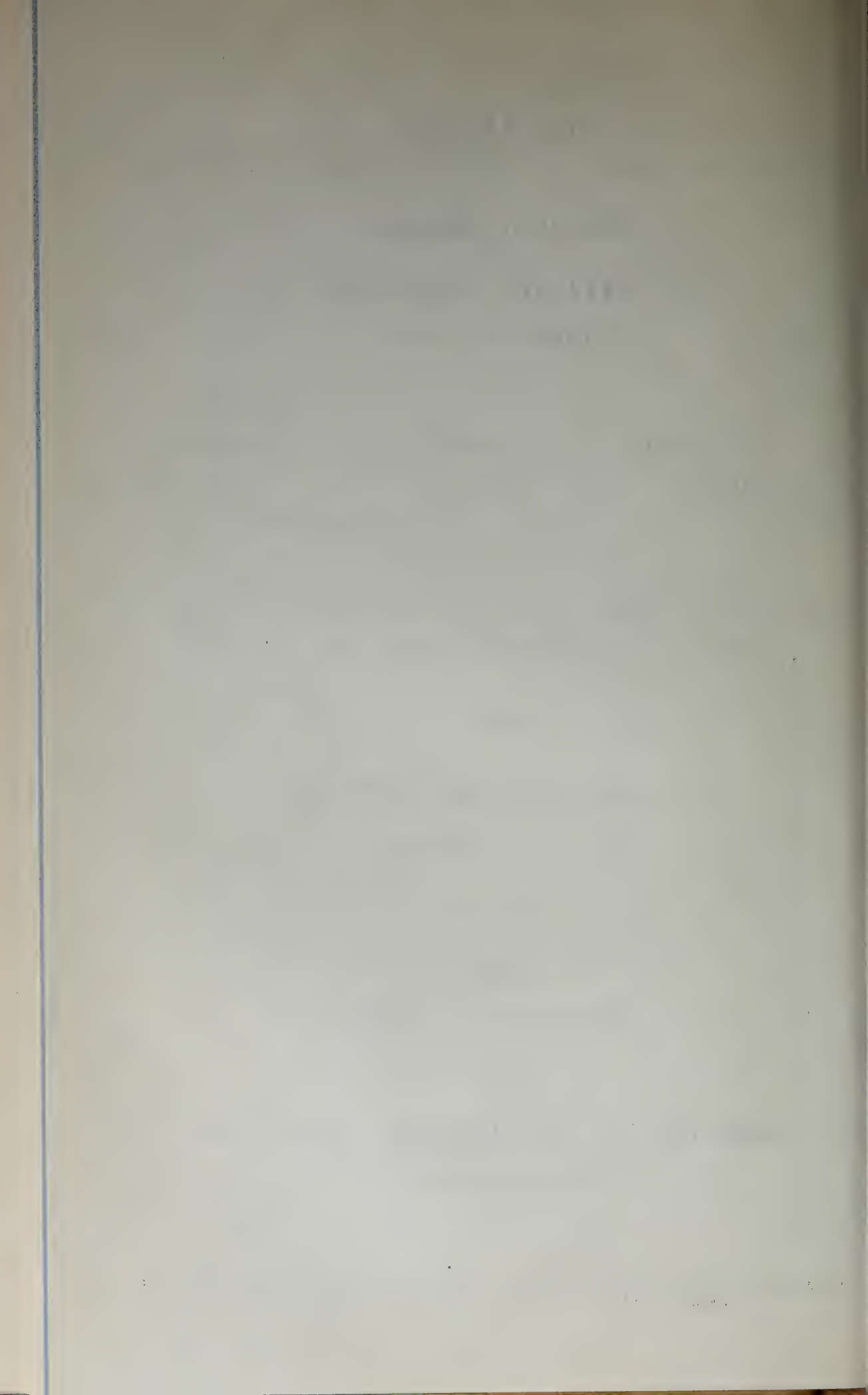
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(Deposition of Merle Montgomery.)

“Q. I see. You don’t remember anybody from Timber Incorporated telling you specifically that they were going to check the scaling?

“A. No, sir.

“Q. How long did you continue to work for Snow Camp Logging Company?

“A. Until around the first of April the next year.

“Q. April, 1954?

“A. About that time, yes.

“Q. You remember the exact date you moved the scale shack? A. No, sir.

“Q. Would it be October 21, 1953?

“A. Gosh, I wouldn’t have no way of telling you.

“Q. You wouldn’t know. But you think there may have been a few logs delivered to the mill after you moved? A. There could have been, yes.

“Q. But it wouldn’t have been very many?

“A. Well, I wouldn’t be able to judge that. I was about four miles down the road.

“Q. Well, don’t you remember that when you did move that all the logs went to town from then on?

“A. There was some that was on some trucks that was too heavily loaded to go to town, some of the stake rigs, but I wouldn’t be able to judge how many was [191] dumped in there.

“Q. As a matter of fact, that was one load, wasn’t it? A. I don’t remember.

“Q. You don’t know? A. No, sir.

“Q. Well, let’s put it this way, Mr. Mont-

(Deposition of Merle Montgomery.)

gomery: Did anybody else do any scaling of logs for Vander Jack after October 21, 1953, anybody except you?

"A. Depends upon where he sold the logs.

"Q. Did he sell logs that were scaled by somebody else? A. Oh, sure.

"Q. That was town deliveries, though, wasn't it?

"A. Town deliveries. All the plywood plants had water scale.

"Q. He sold at water scale and that was down at a point of delivery in town? A. That's right.

"Q. But you don't know of any logs sold of Timber Incorporated after you moved the scale shack, do you, except perhaps this occasional load or two of these stake body trucks?

"A. Gosh, I wouldn't have no way of knowing anything about that.

"Q. Well, if there were, they were scaled by somebody else, is that right?

"A. That's definite.

"Q. You don't know of anybody else scaling for Mr. Vander Jack?

"A. How do you mean that? [192]

"Q. I mean you don't know of anybody besides yourself and Mr. Hershey that scaled for Snow Camp at that period of time?

"A. Up there you mean?

"Q. Up there. A. No, I don't.

"Q. So there was no other scaler in the employ of the company at that time?

"A. Not that I know of, no, sir.

(Deposition of Merle Montgomery.)

“Q. So if any logs did go to Timber Incorporated after that, they were scaled by somebody else and you don’t know who that would be?

“A. That’s definite.

“Mr. Goodwin: That is all. Thank you.

“Mr. Hilger: That is all.”

The Referee: We will take an adjournment until 10:00 a.m. tomorrow.

(Adjourned to Thursday, December 6, 1956,
at 10:00 a.m.) [193]

Thursday, December 6, 1956—10:00 A.M.

Same appearances.

The Referee: Proceed in Snow Camp Logging Company.

Mr. Hilger: At this time I would like to read into evidence the deposition of Harry Hershey, taken at Eureka, California, on Thursday, November 29, 1956.

The Referee: Proceed.

DEPOSITION OF
HARRY HARLAN HERSHEY

Mr. Hilger (Reading): “For the record, would you state your name, please?

“A. Harry Harlan Hershey.

“Q. And where do you reside, Mr. Hershey?

“A. 9591½ D Street in Arcata, California.

“Q. You have previously given a deposition in this matter, have you not? A. I have.

(Deposition of Harry Harlan Hershey.)

“Q. And in that deposition you indicated that you scaled logs at the Peters mill in Redwood Creek up until the latter part of 1953?

“A. I was scaling there up until discharged off the job, if that is what you mean. I don’t know the exact date.

“Q. That would have been sometime in the fall of ’53, as you recall, or do you recall?

“A. I don’t recall the exact date.

“Q. Did you, prior to the time that you have referred to, scale logs at the pond at the Peters mill, that is, during the summer of ’53?

“A. Yes, for [194] awhile there, yes.

“Q. Now then, referring to the last day that you scaled logs at that location, did anyone tell you to leave, or direct you to any other location?

“A. Not myself personally, no. There was—Montgomery was informed that our services weren’t needed there any longer.”

Mr. Goodwin: If it please the Court, at that point I would like to interpose an objection and move to strike the last statement as a voluntary statement, not responsive to the question. He states, “There was—Montgomery was informed that our services weren’t needed there any longer.”

The Referee: It may go out as hearsay.

Mr. Hilger (Reading): “Q. When did that occur?

“A. Oh, it was one morning after we came to work and there was another scaler that the mill had hired.”

(Deposition of Harry Harlan Hershey.)

Mr. Goodwin: The same objection, your Honor, a continuance of the hearsay.

Mr. Hilger: I don't think so.

The Referee: It might not be.

Mr. Goodwin: It is out of context, your Honor, but if the motion be granted, it does not make sense.

The Referee: Let's see.

Mr. Goodwin: It is part and parcel of the previous question. He answers first that Montgomery was informed their services were not needed any longer. The question, "When did [195] that occur?" asks for the same information.

Mr. Hilger: Wait a minute. I asked him when it occurred.

Mr. Goodwin: What occurred?

Mr. Hilger: "* * * the last day that you scaled logs at that location * * *"

Mr. Goodwin: No, no.

Mr. Hilger: Going to the previous question, counsel (reading):

"Now then, referring to the last day that you scaled logs at that location, did anyone tell you to leave or direct you to any other location?"

"A. Not myself personally, no. There was—Montgomery was informed that our services weren't needed there any longer."

The way it stands, I am now referring to the last day he scaled.

Mr. Goodwin: No. "* * * did anyone" direct "you to leave"; that is the principal question.

(Deposition of Harry Harlan Hershey.)

"When did that occur?" is still calling for hearsay. "* * * one morning after we came to work * * *"

Mr. Hilger: I think I can ask him when did he leave, and he can tell me it was the morning another scaler had been hired.

Mr. Goodwin: That is not the question. It is part and parcel of the hearsay.

Mr. Margolis: We submit the objection.

The Referee: I think the question was legitimate. I don't know whether the answer is or not. What is the answer, now? [196]

Mr. Hilger (Reading): "Oh, it was one morning after we came to work and there was another scaler that the mill had hired."

Mr. Goodwin: That would appear to refer to two previous questions.

Mr. Hilger: That was the day another scaler had been hired by the mill.

The Referee: It cannot harm you one way or the other. I will let it stand.

Mr. Hilger (Reading): "Is that——"

"A. (Interrupting): That man had worked there about—I guess about a week before this happened.

"Q. You know that fellow's name?

"A. No, I don't. I didn't know the man.

"Q. Now, were you present—withdraw that. You have mentioned Montgomery. That is the other scaler that was with you at the pond?

"A. Uh-huh.

(Deposition of Harry Harlan Hershey.)

“Q. At Peters’ mill? A. Yes.

“Q. You were assisting Montgomery in the scaling, is that correct? A. That’s right.

“Q. On this particular morning, that is, the last morning that you were there, what, if anything, took place that caused you to leave?

“A. Well, nothing out of the ordinary of myself. Montgomery informed me. He said that we weren’t needed there and that Mr. Green had told him to move our [197] scaling out onto another spot, that we wouldn’t be scaling at the mill any more. He did not come out and tell me that directly.”

Mr. Goodwin: If it please the Court, the same objection there. I move to strike out the witness’ answer commencing as follows: “Montgomery informed me. He said that we weren’t needed there and that Mr. Green had told him to move our scaling out onto another spot, that we wouldn’t be scaling at the mill any more. He did not come out and tell me that directly.” I move that all that be stricken as hearsay, and further, as not responsive to the question.

Mr. Hilger: Oh, it is responsive to the question.

The Referee: What is the question?

Mr. Hilger: “* * * what, if anything, took place that caused you to leave?” He is telling precisely, “I was informed we had been told to leave.”

The Referee: How can he get it without the conversation?

Mr. Stark: “I walked off the job.”

(Deposition of Harry Harlan Hershey.)

Be that as it may, if the conversation took place outside the presence of some representative of ours, it is hearsay.

Mr. Hilger: Montgomery was paid by Timber, Inc., so he testified, and Mr. Peters previously testified that he paid Montgomery up until that time.

The Referee: That does not necessarily show he had the authority.

Mr. Stark: A declaration of an agent can never bind the [198] principal.

Mr. Hilger: Oh, I think it can.

Mr. Stark: Unless it is part of the *res gestae*.

Mr. Hilger: It takes it out of the nature of hearsay whether he had the authority to do it or not.

The Referee: Part of the answer is good, I think; part is not. Let's have the answer.

Mr. Hilger (Reading): "Well, nothing out of the ordinary of myself. Montgomery informed me. He said that we weren't needed there and that Mr. Green had told him to move our scaling out onto another spot, that we wouldn't be scaling at the mill any more. He did not come out and tell me that directly."

The Referee: I will strike it on the last sentence, "He did not * * * tell me that directly."

Mr. Hilger: Perhaps the next question would clear that up.

The Referee: If the next question clears it up, it will stand.

(Deposition of Harry Harlan Hershey.)

Mr. Hilger: The next question is (reading):
“Who didn’t?

“A. Green didn’t.

“Q. Who is Green?

“A. Well, he was the Mill Manager for Timber Incorporated.”

Mr. Goodwin: That conclusively makes the answer inadmissible.

Mr. Hilger: That shows, first, that Montgomery, as an agent of Timber, Inc., was relating a conversation between [199] himself and another employee of Timber, Inc., Mr. Green, which is perfectly admissible from the hearsay point of view. If they had no authority to say these things, that can even be placed in issue. The fact that it was said by one agent to another agent is admissible, it is the proof that it was in fact said; it is not hearsay. It is the act of the claimant or his representative.

Mr. Goodwin: If your Honor please, it is not our responsibility to lay a foundation. Certainly it is not up to us, in view of no foundation here. Furthermore, the record shows that Montgomery was paid by both Vander Jack and Mr. Peters. Certainly there is nothing to show an agency in that relationship.

Mr. Hilger: This has to do directly with the scaling.

The Referee: Wouldn’t it be just as natural to say he was the agent of Vander Jack?

Mr. Hilger: Yes, he was the agent of both, and I believe his statements would be admissible over

(Deposition of Harry Harlan Hershey.)

a hearsay objection as against either, and the statement he is making here directly relates itself to the continuation of the scaling. That was the specific job of Mr. Montgomery. If he had no authority to speak as to the scaling, then he had no authority to speak.

Mr. Goodwin: Even if Mr. Hilger's premise was right, your Honor, this witness' answer is, "Montgomery told me that Green said" so-and-so. If that is not hearsay, I never have seen anything that is not.

The Referee: That is the vice of the whole answer, I [200] think. When he said what Montgomery said is what Montgomery was told by Green, where are you going to show the responsibility?

Mr. Hilger: Well, it is not a matter of vital importance to us. It is already in by other testimony, anyway.

The Referee: It will be stricken.

Mr. Hilger (Continuing reading): "Q. That is Peters mill? A. Uh-huh.

"Q. And you thereupon left?

"A. We did. We moved our scaling shack just south of the cement bridge in Redwood Creek.

"Q. How long have you been working with logs and timber, Mr. Hershey?

"A. Well, it's been several years.

"Q. That's been——

"A. (Int'g) I would say about ten, twelve years in this part of the country and before that I

(Deposition of Harry Harlan Hershey.)

worked in the timber in Oregon or—Wisconsin, I meant to say, ever since I was a youth, which is different type timber.

“Q. You worked in this area then a number of years, however?

“A. Yes, between ten and eleven years.

“Q. And you were familiar with the timber quality in this area as a result of that experience?

“A. Well, I think I am.

“Q. And you scaled a great deal of the timber that was—logs, rather, that was delivered to the Peters [201] mill during the summer of '53?

“A. I scaled quite a few of them.

“Q. And did you observe the type and quality of logs that was being delivered there by the Vander Jacks? How would you describe the quality of the logs that were delivered to the Peters mill by the Vander Jacks during the summer and early fall of 1953?

“A. Well, the type of logs that they were purchasing off from the ranch or being delivered into the mill were some old growth logs, small sized old growth logs, and there were second growth logs, and there was what I call a number three log, which is under twelve inches top, and you will run into quite a bit of that in that timber out through there.

“Q. Now, this was a gang mill, was it not?

“A. That's right.

“Q. And it had a maximum size log capacity of thirty-six inches?

(Deposition of Harry Harlan Hershey.)

“A. Thirty four, I understood. I wasn’t sure.

“Q. That would mean, then, that all the logs delivered there that could be used would of necessity be thirty-four inches or less on the big end in diameter?

“A. Yes, although, if I may make a point clear, there’s been logs delivered there bigger than that, which when they went to the saw they could be bucked, the large end could be bucked off and still use that [202] smaller section of the log, you see, and they would set that other end back into a separate pocket and deliver that to a peeler plant later on themselves.

“Q. Were there many of those type logs delivered by the Vander Jacks?

“A. Yes, I would say there was quite a few.

“Q. Now, a peeler log, is that a higher quality log than a gang log? A. Yes, absolutely.

“Q. Does it have a greater value?

“A. Yes.

“Q. Would you describe the quality of the logs that was delivered there generally as poor, average or superior?

“A. Well, I wouldn’t—I wouldn’t say they were superior. They were an average log for the area.

“Q. Do you know what camp run means?

“A. Yes.

“Q. Would you describe them as camp run quality?

“A. Yes, I would. They were getting—they

(Deposition of Harry Harlan Hershey.)

were getting just as good a log as a man could put out to them with the size limit. You take a log, a big log that they couldn't use at all and still be too rough even for peelers, and, actually there's a lot of number three lumber in them and they would have to send that stuff to town.

"Q. For what reason?

"A. Well, the reason that the mill out there couldn't handle them.

"Q. They were too large for the mill? [203]

"A. Too large, that's right. And then there is peelers that's too big for that mill, too, and what we call a number one saw log is a log that will not meet a peeler grade, but it's too big for their mill and still will cut out fifty per cent of clear and better lumber. I have a book with me. I brought this up on purpose. I'm referring to logs now for camp run logs that you will run into with this type of log with a sweep in——

"Q. (Int'g) Pardon me a moment. Reference to a photograph wouldn't reveal itself in the record, Mr. Hershey. A. No.

"Q. Would you describe the type of log that you're talking about so that anyone reading a transcript of your testimony would understand what kind you're talking about? -

"A. Yes, certainly. This log has a distinct crook in it and we have lots of logs go in there of that sort and we have had some that come in with a distinct sweep, shaped like a banana, and those logs are docked to offset the loss in that log.

(Deposition of Harry Harlan Hershey.)

“Q. You mean when you scale them you decrease the footage?

“A. Deduct the waste material from that log as near as we can.

“Q. When you scale it? A. That’s right.

“Q. In other words, provision is made for defective [204] logs? A. Yes.

“Q. In the scale or footage that is allotted to that log? A. That’s right.

“Mr. Hilger: That is all, Mr. Hershey.

“Cross-Examination

“By Mr. Goodwin:

“Q. During the period of time that you were scaling there, gang logs were also delivered to town by Vander Jack, weren’t they?

“A. Occasionally, yes.

“Q. Now, isn’t it a fact that the logs which you saw and scaled there ran a greater percentage to number three than the average camp run logs in that territory?

“A. There for a short time, yes, and before that, though, no.

“Q. Well, now, you scaled in there from June until October? A. Right.

“Q. And you didn’t scale all the logs that came in? A. No.

“Q. You only scaled part of them, isn’t that correct?

“A. I scaled a percentage of them.

(Deposition of Harry Harlan Hershey.)

“Q. Mr. Montgomery was the head scaler?

“A. That’s right.

“Q. And I believe you testified before that you were in there because at times the scaling was more than he could do alone?

“A. That’s right. [205]

“Q. And, accordingly, you were in there to scale the overflow, so to speak, or to scale what he couldn’t handle, is that right?

“A. That’s right.

“Q. But he was the head scaler?

“A. That’s right.

“Q. Now, did you also scale logs that went to town? A. No.

“Q. You did not. Who scaled those?

“A. Montgomery.

“Q. Montgomery scaled the town logs and you scaled the excess logs at the mill that Montgomery could not scale? A. I have scaled——

“Q. (Int’g) Or that he was too busy to scale?

“A. I have scaled logs that went to town after that, after we was away from that point, but at that time I did not.

“Q. I see. Now, nobody from Timber Incorporated talked to you directly, I understand from your testimony, about moving your scaling point to some other place? A. Not to me, no.

“Q. Your information is limited to what Mr. Montgomery told you?

“A. I was informed of that the morning we went to work.

(Deposition of Harry Harlan Hershey.)

“Q. Now, you have been employed in the woods in Humboldt County for about ten years, is that correct, sir? A. Around the area, yes. [206]

“Q. And prior to June of 1953 were you employed as a scaler? A. Yes.

“Q. Where did you scale before that?

“A. I scaled for Ward Brooks Lumber Company in—east of Garberville—west of Garberville. I scaled for Dean Lansing. I scaled on top of Lord Ellis for the Humboldt Bay Log Scaling Bureau.

“Q. The Humboldt Bay Log Scaling Bureau?

“A. Certified scalers. I was in the same capacity at Brooks' mill. I was holding the same capacity when I scaled for Dean Lansing. I scaled at what is known as the switch-back above the Buckhorn gas station on 299. I scaled at the 299 strip which is located about half a mile east of McNord Lumber Company.

“Q. Half a mile east of McNord Lumber Company?

“A. Approximately half-mile, yes. You know where the big planing mill is there that California Pacific built just recently?

“Q. You mean right on Highway 299?

“A. Yes.

“Q. Yes. A. I built that strip in there.

“Q. Now, when you were scaling at the Vander Jack-Peters operation up there, you did not grade the logs, did you?

“A. No, it was a mill-run scale.

(Deposition of Harry Harlan Hershey.)

“Mr. Goodwin: I think that is all I have
Thank you. [207]

“Redirect Examination

“By Mr. Hilger:

“Did you say mill-run or camp-run?

“A. Camp-run I meant to say.

“Mr. Hilger: That is all.”

Mr. Hilger: At this time I would like to read
into evidence the deposition of Virgil H. Ray,
taken at Santa Rosa, California, on the 29th day
of October, 1956.

The Referee: Proceed.

DEPOSITION OF VIRGIL H. RAY

Mr. Hilger (Reading): “Q. Will you state
your name, please?

“A. My name is Virgil H. Ray.

“Q. Where do you reside, Mr. Ray?

“A. Cisco, Cisco Grove, California.

“Q. Cisco Grove, that is near Truckee?

“A. It is about twenty-five miles this side of
Truckee, California.

“Q. Now, in the fall of 1953 by whom were you
employed?

“A. Well, I was employed by the Snow Camp
Logging Company.

“Q. What were you doing for them?

“A. Driving logging truck.

“Q. What type of truck were you driving?

(Deposition of Virgil H. Ray.)

“A. I was driving an L-210 International with a GMC motor, stake truck.

“Q. Is that properly described as an off-the-highway rig? A. Well, I guess it could be. [208]

“Q. Were you carrying off-the-highway loads?

“A. Yes, sir.

“Q. Where were you delivering the logs that you were hauling?

“A. I was delivering these logs to the mill there on the Redwood Creek.

“Q. That being the mill of Timber, Inc., and S. A. Peters? A. I guess it would.

“Q. Now, having reference to the date of October 21st, 1953, did you haul any logs to the mill on that day? A. Yes, I did.

“Q. Were there any logs taken there on that day, that arrived before yours did, in other words, was yours the first load that morning?

“A. I believe it was.

“Q. When you arrived at the mill with that load what happened?

“A. Well, the dump man told me that his company told him not to take any more of our loads.

“Q. That was the dump man at the mill pond of Timber, Inc.’s mill? A. Yes, sir.

“Q. He was regularly dumping logs and scaling logs for them? A. That’s right.

“Q. Did he refuse to scale or dump your load?

“A. Yes, he did.

“Q. And then what happened?

“A. Well, I saw our truck foreman. [209]

(Deposition of Virgil H. Ray.)

“Q. What is his name?”

“A. Charles Eckles, some people call him Eckert, I don’t know which is which.

“Q. Well, if the record revealed that his name was Heccar, this man who had that job, would that be the same man?”

Mr. Hilger: At this time I would like to observe for the record that the proper spelling is H-e-c-k-a-r-d (continuing reading):

“A. Yeah, it must be.

“Q. The truck foreman for your company?”

“A. Yeah.

“Q. And then——

“A. (Continuing) ——He told me to dump the load and go back to the woods and get some more logs.

“Q. Did the dump man give you a scaling receipt for the load when you put it in the pond?

“A. No, sir.

“Q. Did he refuse to give you one?

“A. He refused to sign my slip I had my load, yes.

“Q. Now, this load that you were carrying that particular day, was that one that you could have carried in town over the highways?

“A. No, sir.

“Q. You could not get on the highway with the regular load that you had on that particular day?

“A. That’s right, sir.

“Q. That’s all I have. [210]

(Deposition of Virgil H. Ray.)

“Examination

“By Mr. Cissna:

“Q. Now, this load that you referred to was on October first, 1953, is that right?

“A. I think it was October 21st.

“Q. October 21st—you did dump your logs?

“A. Yes, sir.

“Q. You weren't held up very long?

“A. Oh, probably thirty minutes.

“Q. Thirty minutes was not unusual in dumping logs sometimes when they have a jam, is it?

“A. No.

“Q. Your answer is that it is not unusual? An unusual delay, in other words? A. No.

“Q. You say you didn't get a scale ticket? You didn't get a receipt for those logs?

“A. That's right.

“Q. Had you previously been issued a scale ticket on the logs for those logs, or any logs that you brought in? A. That's right.

“Q. You had each time you brought them in?

“A. Yes.

“Q. Do you know if that receipt was given to anyone else? For instance, was it given to your truck foreman?

“A. I couldn't say for sure about that because I don't go around prying into other people's business. [211]

“Q. Did you make any further loads that day?

“A. Yes, I hauled some more logs that day.

(Deposition of Virgil H. Ray.)

“Q. And you dumped those? A. Yes.

“Q. What would you do with your scale tickets or receipts, which were they, scale tickets?

“A. Scale tickets.

“Q. What did you do with those when you got them, normally?

“A. Took them to the Snow Camp office and turned them into the office.

“Q. And you don't know whether they got a scale ticket for those logs, do you?

“A. No, I couldn't say.

“Q. That is all.

“Examination

“By Mr. Hilger:

“Q. You hauled further loads that day to Timber, Inc.?

“A. Well, they were dumped in that pond.

“Q. The remainder of that day?

“A. Yes, I talked to Charlie, like I told you, the truck foreman, and went back for another load of logs that was someplace there; well, he said it was all right to go right ahead as if everything was okay. I supposed he had been to the office and straightened everything out, sometimes they do, argument, you know, about small logs or knotty logs or something, rotten logs or something like that, and I didn't pay any more attention; I supposed he had fixed it up. [212]

“Q. I see. That's all.

(Deposition of Virgil H. Ray.)

“Cross-Examination

“By Mr. Cissna:

“Q. On the logs or loads that you hauled on that same day you got scale tickets for those?

“A. Yes.

“Mr. Hilger: The scale tickets were receipted by the dump man, the other ones?

“The Witness: Yes, sir.

“Q. Do you recall who receipted those, was it Merle Montgomery that receipted those scale tickets the remainder of that day?

“A. Well as near as I remember, this Merle Montgomery, he——

“Q. Yes——

“A. The Bureau scaler?

“Q. Right.

“A. He scaled on top of the Lord Ellis Mountain. No, wait a minute, he was the scaler by the pond that fall, later.

“Q. He scaled at the pond until the 21st of October, did he not? A. I guess so.

“Q. And on the 21st of October he moved up to Lord Ellis Mountain?

“A. Yeah, some time after that.

“Q. And he was replaced by this new scaler who refused to receipt your load, is that right?

“A. No, they, you know, this Montgomery, he is the one that would say—to take this load to so-and-so, Arcata, or this one or that one to some other mill, [213] dump them a dozen different places, and sometimes we dumped a little late, and all stuff as

(Deposition of Virgil H. Ray.)

that. Well, my load was already sorted and picked out in the woods to dump in the pond——

“Q. ——Timber Incorporated? A. Yes

“Q. You were driving an off-the-highway rig— other trucks went elsewhere? A. Yes.

“Q. As far as you were concerned you went only to Timber Incorporated when you were driving the off-the-highway rig?

“A. My load was scaled out in the woods at the loading machine, in the woods, as a general rule it was scaled out there, came in and signed the ticket and dumped them in the pond.

“Q. Now, on this particular day when you were refused a receipt for your load, are you positive that you hauled any more loads that day or thereafter to Timber Incorporated?

“A. Quite certain I did.

“Q. The same day, or anytime thereafter?

“A. Dumped in there for a few days, as near as I remember, after that. I wouldn't say how long, I don't remember just how long it was, three or four days.

“Q. After you were refused a scale ticket or receipt by this man at the pond, the man at the pond, the scale tickets were taken care of by Mr. Montgomery? [214]

“A. That's true.

“Q. Not the man at the pond? A. Right.

“Q. That is all.

“Mr. Cissna: That is all.”

Mr. Hilger: I would like to call Mr. Vander Jack.

CLARENCE C. VANDER JACK

recalled as a witness for the Trustee, previously sworn.

The Referee: You have been sworn already.

Direct Examination

(Resumed)

By Mr. Hilger:

Q. Mr. Vander Jack, you ceased delivering logs to the Peters mill on or about October 21, 1953?

A. I did.

Q. What events and acts caused you to cease making deliveries at that location?

A. Well, during the summer, spring, and early fall of 1953, we found it extremely hard to deliver logs to Mr. Peters because of the confusion at the dump all the time, and I think it was on October 18th I was out in the woods, and one of the boys came and told me I better get over to the mill, there was some confusion there. So I went over there and Mr. Koontz's trucks, carrying logs—Ike Koontz's logs——

Q. Ike Koontz's logs?

A. Logs logged by Wheeler Logging Company, and on their trucks.

Q. Were those logs being delivered into Peters' pond at that time? A. They were.

Q. You were still making deliveries to the Peters mill at [215] that time? A. I was.

Q. That was October 18th?

A. October 18th.

(Testimony of Clarence C. Vander Jack.)

Q. And you went to Peters' pond?

A. I did.

Q. Then what took place?

A. Mr. Green was there, Mr. Peters' manager at that time. I asked him what the trouble was. He said, I had to replace Montgomery as a scaler, and they would accept no more of my logs at his scale or the contract price, and the price would be \$28.00 and their scale, should I care to deliver logs.

Q. What was the price under the contract at that time?

A. At that time it was \$34.00, \$35.00, somewhere. I would have to look at the records to see.

Q. And Mr. Green made this statement to you. Then what did you do?

A. I told him I did not think I could do that. So I went into town and sought advice, and called Mr. Peters, and he substantiated the statement of Mr. Green.

Q. Could you produce logs for \$28.00?

A. I could not, no.

Q. Continue.

A. We attempted deliveries for three or four more days. We got no scale slips or anything. So I sought further advice again, and then I sent this Virgil Ray to demand sales slips.

Q. That is the same Virgil Ray whose deposition was just read? A. That is correct.

Q. You sent him in to demand slips?

A. I did. He was refused it. I think for the balance of the day he did haul. [216]

(Testimony of Clarence C. Vander Jack.)

Q. Were any receipts given by the mill for subsequent loads? A. There never was.

Q. To this day have you ever received an accounting on those logs? A. I never have.

Q. And that situation continued for deliveries from October 18th through the 21st?

A. That is correct.

Q. Without that scale record, or scale ticket and receipt, would you have any manner or means of establishing that the logs were actually delivered?

A. We have none at all.

Q. Did you have any means of ascertaining the hauls delivered there?

A. It would be impossible.

Q. Now, during this period, October 18th to October 21st, were you at the mill property at any time during that period?

A. I was by there several times.

Q. Were any other loggers delivering logs to the pond?

A. Wheeler and Walker were both delivering.

Q. Were those your logs?

A. No; they were not.

Q. Were Wheeler and Walker working for you at any time? A. No; they never were.

Q. You had given them no authority to deliver to that location for your account?

A. No; I never did.

Q. Had you had any discussions with Mr. Peters, authorizing him to accept deliveries from loggers other than yourself? A. No.

(Testimony of Clarence C. Vander Jack.)

Q. You had at no time given Mr. Peters authority to accept logs from other producers?

A. No. [217]

Q. After these events of October 18th and October 21st, wherein, as you testified, you were unable to deliver further logs to the mill, what effect did that have upon your business operation?

A. I was delivering approximately 40 per cent of my production to Mr. Peters at that time. I had to throw that additional load onto the market in Arcata.

Q. Did you have to find buyers?

A. I had to find buyers, of course, and the market was fairly saturated at that time. At that time the cold decks were up for the winter, and they were only buying for daily needs, and additional logs on the market softened the market, and we did not get the price we should have out of the logs. We were not able, of course, to meet all our obligations, and subsequently we were bankrupt over the deal.

Q. Was this refusal to accept further logs the prime cause of your bankruptcy?

A. It was.

Mr. Goodwin: I object to that as calling for the opinion and conclusion of the witness. It is pretty remote and speculative.

Mr. Hilger: He is familiar with what caused his financial difficulties. I think he is quite competent to testify in that regard, as to what effect

(Testimony of Clarence C. Vander Jack.)

the refusal to accept further logs had on his business.

Mr. Goodwin: He can testify to the fact, but to answer whether it was the prime cause of his bankruptcy I think is carrying things a little too far, your Honor. [218]

Mr. Stark: What he did, or what happened, he can testify.

Mr. Hilger: If he knows what the cause was——

Mr. Stark: Under the rules of evidence, he is not permitted to testify as to causes. He can state the facts.

Mr. Margolis: That is what he has done. He stated the causes, if I may make the observation.

Mr. Stark: I said he cannot state the cause.

Mr. Margolis: He has already testified as to the causes; he is now giving the effect.

Mr. Hilger: The effect was that he was made bankrupt.

Mr. Stark: The question was, What was the cause?

The Referee: What was the prime cause? That does call for a conclusion.

Mr. Hilger: Well, I will withdraw the question.

The Referee: Very well.

Q. (By Mr. Hilger): Now, Mr. Vander Jack, did your firm keep records during 1953?

A. We did.

Q. And those records would reveal the revenues from your operation, would they?

A. They would.

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: Don't lead him so, counsel. Let him testify on the basis of his own mental condition. He is sitting there saying yes and no to you.

Mr. Hilger: He is answering the questions.

Mr. Stark: You are not permitted to lead him. You know that.

Q. (By Mr. Hilger): What would those records reveal, Mr. [219] Vander Jack?

A. They would reveal our trucking, our log scale, our deducts, our prices, everything that is necessary to run the logging business.

Q. Now, did you from time to time during the period from January through September of 1953, hire any trucking done by trucks other than ones you owned? A. We did.

Q. What was the arrangement or basis under which that hiring was done?

A. It was done on a so much per thousand and for mileage hauled and the amount of scale hauled.

Q. Now, those haulers you engaged, did they own their own equipment, or did you?

A. They owned their own equipment.

Q. And they supplied the necessary personnel to operate the vehicles? A. They did.

Q. They made a flat per thousand charge?

A. They did.

Q. Did that charge vary in accordance with destination or distance of the destination from the point of origin? A. It did.

Q. Is much of that type of thing done in the logging industry in Humboldt County?

(Testimony of Clarence C. Vander Jack.)

A. It is a very common practice.

Q. Would you say it is a common and general practice to engage hauling loggers on that basis?

A. It is.

Q. Now, in 1953 were there any established or accepted rates from one area into mills in another area?

A. There were. [220]

Q. Was there an established rate for hauling from the Redwood Creek area, where you were logging, into the Arcata mill area?

A. There was.

Q. What was that rate?

A. It was \$9.00 to Blue Lake, \$10.00 to Arcata, \$12.00 out to the Mutual Timber past Samoa, I believe \$11.00 to Eureka.

Q. And what would you say would be the average truck haul rate from your location at Redwood Creek to the Arcata area?

A. I think our average on that was \$10.31.

Mr. Hilger: Would you gentlemen like to inspect this?

Mr. Stark: Are you going to offer it in evidence?

Mr. Hilger: I will either offer them in evidence or have the witness make reference to them. I have a summary prepared that the witness has prepared with these records to ascertain the average, and I will offer the summary into evidence.

Mr. Goodwin: If we are going to inspect these records at this time it will take quite awhile. I think we better defer it.

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: You say you have a summary of what the records purport to show?

Mr. Hilger: Yes.

Mr. Stark: Who prepared it?

Mr. Hilger: I prepared it. Mr. Vander Jack then took and checked it against the figures shown in the records, which he is prepared to testify to as an accurate and correct tabulation of what those records show. [221]

Mr. Stark: Isn't that just what he said, that the average cost of the haul from his place to Arcata was \$10.31? Isn't that what he said?

The Referee: Yes.

Mr. Stark: We did not object. What is the use of bolstering it?

Mr. Hilger: Counsel will recall that he made quite a sustained objection that we produce the records, that he wanted to look at them.

Mr. Stark: We still do.

Mr. Hilger: The records will reveal, which we have in court, and will give counsel all the opportunity he wants to look at them.

Q. I hand you here——

Mr. Stark: Wait a minute, please.

The witness testified, to next to the last question, that the average cost of the haul to him from his logging area into Arcata throughout this period of time was \$10.31 per thousand. We did not object to it, and it is now in the record. What he proposes to do is to introduce a flock of documents, followed by a summary showing, purportedly, that the aver-

(Testimony of Clarence C. Vander Jack.)

age per thousand feet for the delivery of lumber from his area into the Arcata area was \$10.31. Now, it is cumulative, and would do nothing but clutter the record.

Mr. Hilger: We will offer the summary.

The Referee: Why offer it at all? [222]

Mr. Hilger: If they will stipulate that was the charge——

The Referee: No; it is up to them to cross-examine and prove it was otherwise.

Mr. Hilger: Very well, that settles that.

Mr. Stark: I always have a tender feeling for the creditor's money. I am trying to save money on their part.

Q. (By Mr. Hilger): What was your hauling cost into the Peters mill from your area?

A. \$4.00 a thousand.

Mr. Hilger: The records again reveal that there were a number of destinations for the Arcata trucks, with varying rates. Therefore, it was necessary to prepare a tabulation from the records to find the average cost of transporting logs to the Arcata market. In the case of the haul into the Peters mill, there was only the one rate, \$4.00. Therefore, it was not necessary to prepare a lengthy summary to ascertain that average.

Mr. Goodwin: May I ask a question on voir dire?

The Referee: Surely.

Q. (By Mr. Goodwin): Is that what you paid your gyppo's, \$4.00?

(Testimony of Clarence C. Vander Jack.)

A. That is what I paid them.

Q. (By Mr. Hilger): Now, then, Mr. Vander Jack, I am exhibiting to you a folder bearing date on the index page January 1, 1953, and containing pages bound to the Manila folder, and ask if you can identify that series of documents (handing folder to the witness)?

A. This is——

Mr. Goodwin: Wait a minute. He did not ask what it was.

The Referee: No; he asked if you could identify it. [223]

A. I can.

Mr. Goodwin: Now we are entitled to see it.

Mr. Hilger: While counsel is examining that——

Q. May I ask, are those general records of Snow Camp Logging Company?

A. They are.

Q. Were they regularly maintained in the course of business?

A. They were.

Q. The information noted thereon was placed thereon at or about the time of the transactions?

A. It was.

Q. That was done under your control and under your direction?

A. It was.

Mr. Stark: Does this folder contain the same information that is upon this so-called stumpage delivery?

Mr. Hilger: Yes; it contains that, and a multitude of other things.

Mr. Stark: Are you interested in the multitude of other things, or just this summary?

(Testimony of Clarence C. Vander Jack.)

Mr. Hilger: We are interested in the summary, and at least one other item.

Q. Now, I will hand you this same document again and ask you of what is that a record?

A. It is a record of the gross and net footages of our logs delivered to different mills, their raft numbers, and their brands.

Q. You placed a brand upon your logs?

A. We did.

Q. Did you place more than one brand?

A. We did.

Q. What was the purpose of that?

A. The purpose [224] was to make the cut-off at a designated time so you could ascertain your then timber inventory and get down to the actual cost of your logs. If you did not do that, you would not have an accurate record of what the cost of the logs amounted to.

Q. Part of the accounting?

A. Part of the accounting.

Q. Referring to these documents again, to Column 7, entitled "Timber, Inc.," was the figure under the heading in the column comprising the footages delivered to Timber, Inc.?

A. It was.

The Referee: What column are you referring to?

Mr. Hilger: Column 7, entitled "Timber, Inc."

Q. And referring to Columns 5 and 6, bearing the names of other lumber mills, the figures under those would respectively show the deliveries to

(Testimony of Clarence C. Vander Jack.)

those locations? A. They would.

Q. Now, then, that is the first page of the document, or series of documents.

Referring to the second page, and the lower set of tabulations, the first column is entitled "Gross," and underneath that is a group of figures. What does that figure represent?

A. It represents the gross scales delivered.

Q. That would be the gross scale of the logs before deductions for defect or low grade?

A. That is correct.

Q. Now, the second column, entitled "Cut," there are some percentage figures under that, 12.1 per cent for Thrasher, 6.6 [225] for Cannon Ball, and 4.5 per cent for Timber, Inc. What do those figures represent?

A. Those figures represent the difference between the gross scale and the net scale, the percentage cut for logs delivered.

Q. In other words, by which the gross scale had been decreased to give allowance for defect in low grade? A. That is right.

Mr. Stark: Does that mean at the pond?

A. It does.

Q. (By Mr. Hilger): And likewise, referring to the third page of this particular document, the lower tabulation, the cut of 7.1 per cent for Timber, Inc., and 10.5 per cent for Thrasher. Would that mean that there was less deduct from the gross scale at Timber, Inc., than it was at Thrasher's?

A. It would.

(Testimony of Clarence C. Vander Jack.)

Q. Are you familiar with log-scaling and grading practices in Humboldt County, and were you in 1953? A. Very familiar.

Q. What would be the significance of the comparison of percentage for deduct?

A. Well, it would more or less indicate that Mr. Peters was getting a more thrifty type log, less defect.

Q. Less defect in the logs being delivered to Timber, Inc., than to other mills?

A. That is right.

Mr. Stark: Or a difference in opinion of the respective scalers. [226]

Mr. Hilger: They were scaled by a certified bureau scaler.

Q. Were they not? A. They were.

Q. Was any objection to the scale received by you prior to October 21st?

A. None given me.

Q. You received pay according to the scale of the certified scaler prepared as to footage?

A. We did.

Q. Was that payment received from Timber, Inc., or Mr. Peters? A. It was.

Q. The scale at that time was not questioned?

A. It never was.

Mr. Hilger: We will offer this as the Trustee's next, or perhaps I can observe for counsel that all the following folders are exactly the same except they cover different periods of time. I will offer the whole group as one exhibit.

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: O.K.

The Referee: Very well.

Q. (By Mr. Hilger): Referring to that folder——

Perhaps I better have it marked and identified, before.

The Referee: No. 14.

(The folders referred to were admitted in evidence as Trustee's Exhibit No. 14.)

Q. (By Mr. Hilger): You have made, or had made, a summary of the footages revealed in these 20 folders that have just been introduced into evidence, have you not? A. Yes.

Q. Have you checked the accuracy by comparison of the figures shown on the summary to the individual figures shown in the [227] exhibit just introduced? A. I have.

Q. I hand you now a summary entitled "Net Stumpage Delivered to Timber, Inc., by Snow Camp Logging in Period January 1, 1953, Through September 30, 1953," and ask if that is an accurate and correct tabulation of the figures shown in the many parts of the exhibit (handing document to the witness)? A. It is.

Mr. Hilger: For the guidance of the Court, I would like to offer that next in order.

Mr. Stark: That is the one with the total figures on it?

Mr. Hilger: Yes.

The Referee: Trustee's 15.

(Testimony of Clarence C. Vander Jack.)

(The summary referred to was admitted in evidence as Trustee's Exhibit No. 15.)

Q. (By Mr. Hilger): Referring to that portion of Trustee's Exhibit No. 14, bearing date September 1st to 15th, 1953, and further referring to the third page thereof, the first six lines of the second column, are those the same deduct figures? That is, do they represent the amount of percentage deduct for the period? A. They do.

Q. That would reflect, or the significance of that tabulation is to show that Timber, Inc., got a six per cent deduct, Trasher 11.5 deduct, and Western Stud 10.5 deduct, McIntosh seven per cent deduct, and Mutual Plywood 13.8 deduct?

A. That is right.

Q. And that would cover logs delivered from September 1st to 15th, 1953?

A. It would.

Q. Now, referring to the portion of Exhibit No. 14 bearing date September 16 to 30, 1953, and referring to page 3 thereof, the top six lines, second and third columns, the significance of that is that Thrasher had 11.2 per cent deducted, Western Studs 18.4 per cent deducted, Timber, Inc., 7.9 per cent deducted, M. & M. 43.4 per cent deducted, Mutual Plywood 24.22 per cent deducted, and McIntosh 29.01 per cent.

The Referee: Isn't that all set forth?

Mr. Hilger: It is a matter of explaining the significance of the figures, your Honor.

The Referee: Aren't they so designated?

(Testimony of Clarence C. Vander Jack.)

Mr. Hilger: After this explanation, I think so, yes.

Q. That is carried out throughout the exhibit?

A. That is right.

Q. Wherever that appears in these papers, that is the significance of it?

A. That is right.

The Referee: Take a ten-minute recess.

(Recess.)

Mr. Margolis: I was looking for the photostatic copies of the checks.

Is it possible, Mr. Goodwin and Mr. Stark, that we be furnished with photostatic copies of the checks introduced yesterday, and also the invoices?

Mr. Goodwin: I have another set.

Mr. Margolis: If we can have a statement covering the cost of a set of photostatic copies of the checks and a [229] photostatic copy of the invoices, we will send a check forthwith in payment of them.

Mr. Goodwin: All right.

Mr. Margolis: Thank you, very much.

CLARENCE C. VANDER JACK

resumed as a witness for the Trustee; previously sworn.

Direct Examination

(Resumed)

By Mr. Hilger:

Q. Now, Mr. Vander Jack, I am handing you a sheaf of documents bound together by an Acco binder, bearing the legend across the face of the

(Testimony of Clarence C. Vander Jack.)

cover, "1953 Payroll Records." Can you identify that document (handing document to the witness)?

A. These are the payroll records in the Snow Camp Logging Company that I had prepared.

Q. Were they prepared in the ordinary course of business? A. They were.

Q. At or about the time these transactions were taking place? A. They were.

Q. Under your direction and control?

A. Under my direction and control.

Q. They constitute part of the records, the regular accounting records, of Snow Camp Logging Company? A. They do.

Q. And that covers the payrolls for 1953?

A. It does.

Q. Now, referring to the fourth page of this document, there are columns bearing various wordings, "Y. and L." What would that be?

A. That is the yarding and loading [230] payroll.

Q. Two columns headed "S. T." and "O. T."?

A. One is straight time and the other is overtime.

Q. Would the figures that are under "Y. and L.," would that be the payroll for that particular period involved allocated to the yarding and loading? A. That is right.

Q. Similarly, the next column would be the road? A. That is right.

Q. That would be work done on the road?

A. That is correct.

(Testimony of Clarence C. Vander Jack.)

Q. And "Falling and Bucking," that is the significance of "F. B."?

A. That is the significance of it.

Q. That is the cutting of the trees?

A. Right.

Q. Then, going on over to "Trk.," that is trucking?

A. That is trucking.

Q. That would be the actual wages paid by you to the truck drivers that you hired to drive your own trucks?

A. That is correct.

Q. That would be different and distinct from the amounts you paid for the hired trucking about which you previously testified?

A. That is correct; it would be different.

Q. And the figures in that column, then, and similarly throughout this paper, or this sheaf of papers, the amounts under that column called "Trucking" would be the amounts paid for trucking to your employees who drove your trucks?

A. That is right.

Mr. Hilger: I offer this as the Trustee's [231] next.

The Referee: It will be Trustee's No. 16.

(The 1953 payroll records referred to were admitted in evidence as Trustee's Exhibit No. 16.)

Q. (By Mr. Hilger): Now I hand you a document here entitled "Summary of Hauling—Wage Paid." Has that been prepared from the figures

(Testimony of Clarence C. Vander Jack.)

recorded in Exhibit No. 16 which has just been introduced (handing document to the witness)?

A. It was.

Q. Have you compared that with the figures contained in Exhibit No. 16 as to the accuracy and correctness thereof? A. I have.

Q. Is this a correct tabulation of the hauling wages paid from June 1, 1953, through October 15, 1953? A. It is.

Mr. Stark: Mr. Hilger, at this point do I understand that these figures are going into the record covering the cost of timber, hauling, deliveries, for 100 per cent of Snow Camp's production, of which we got only 40 per cent?

Mr. Hilger: The payroll, of course, relates to the entire operation. That is correct, yes.

Mr. Stark: And with the exception of the footage of lumber——

Mr. Hilger: Designated specifically as Timber, Inc.; otherwise they cover the entire operation.

Mr. Stark: Under no theory could we be charged with more than 40 per cent.

Mr. Hilger: That would appear to be fairly correct. [232]

We will offer this as the Trustee's next.

The Referee: Trustee's No. 17.

(The summary of Hauling—Wage Paid, referred to was admitted in evidence as Trustee's Exhibit No. 17.)

Q. (By Mr. Hilger): Now, then, I am handing

(Testimony of Clarence C. Vander Jack.)

you Trustee's Exhibit No. 17. The first column of figures, straight time, what was the hourly rate paid those drivers at this time on a straight time basis (handing document to the witness)?

A. \$2.00 an hour.

Q. Would it be correct to say that if you divided the total of the first column, straight time, by two, you would get the number of hours represented by the payroll? A. It would.

Q. Referring to the second column, overtime, what was the hourly rate at which that was paid?

A. It was made at time and a half, so it would be \$3.00 an hour.

Q. Would it be correct to say that if you divided the total contained in the second column by three you would get the number of man-hours involved? A. It would.

Q. The total of the two man-hours would be the total man-hours that your truck drivers put in during the period involved?

A. That is correct.

Q. Now I show you a folder bearing on the index "September Trucking, 1953." Can you identify that (handing document to the witness)?

A. Yes; it is our trucking record costs for our trucking and footages hauled. [233]

Q. Were these records all maintained in the regular course of business? A. They were.

Q. And the entries therein were made at or about the time the transactions were taking place?

A. That is right.

(Testimony of Clarence C. Vander Jack.)

Q. Under your direction and control?

A. Under my direction and control.

Q. The contents of that folder constitute part of the regular and permanent accounting records of Snow Camp Logging Company?

A. They are.

Mr. Hilger: Let the record reveal that I am taking from this folder a tabulation entitled "Snow Camp Truck Earnings, March 15 to August 31, 1953."

Q. Was that prepared shortly after August, 1953? A. It was.

Q. And what is the significance of these figures shown on here?

A. Well, I knew that my trucking was costing too much money. I wanted to see how much we were losing on them, so I had the records prepared to find just what we were losing.

Q. How were the figures arrived at?

A. From the actual earnings of the trucks and what the trucks should have earned.

Q. How do you compute the earnings of your own trucks?

A. We, in our operation at Snow Camp, charged our trucks, or charged the company from the trucks, the same price we paid the contract haulers.

Q. \$4.00 per thousand to the Peters mill?

A. That is [234] right.

Q. And that was the same price you paid the contract haulers when your trucks were used to

(Testimony of Clarence C. Vander Jack.)

haul to other mills? A. That is right.

Q. By using those rates, together with the foot-ages hauled, you generated the earnings of your trucks during that period of time, computed on that basis?

A. That is the way it was computed.

Q. Now, then, referring over to the first column, headed "Truck No.," and the numbers thereunder, commencing with 12 through 27, what does that denote? A. That is the truck number.

Q. Each one of those numbers is a separate truck? A. That is correct.

Q. Going horizontally to the right across the schedule, you have columns entitled "March 15 to 31," then "April 1 to 30," "May 1 to 31," and so on, through August 31. Does that signify the months of operation of those trucks?

A. It does.

Q. And the figure set opposite the truck number and under the monthly heading would be the earnings of that truck during that month?

A. That is correct.

Q. And the last column over on the right, "Totals," would be the total earnings of the trucks during the entire period of time?

A. That is right.

Q. And this \$93,561.42 would be the total earnings of all these trucks during that time?

A. That is right. [235]

Q. Now, each of the figures shown here—that

(Testimony of Clarence C. Vander Jack.)

is, the figure opposite a truck and under a month—would represent a truck month of operation?

A. It would.

Q. How many total truck months of operation would be revealed on this?

A. I believe 66 is the number.

Q. You counted them? A. I have.

Q. Do you know what the average gross earnings of a hired truck were in 1953, in the summer, in that area? A. I do.

Mr. Goodwin: Just a few questions on voir dire.

The Referee: Surely.

Q. (By Mr. Goodwin): The average truck earnings of a truck in that area would depend on a number of things, would it not, Mr. Vander Jack?

A. It would depend on a certain number of things, yes.

Q. The terrain?

A. The terrain, correct.

Q. The condition of the road?

A. Yes; it would.

Q. The presence or absence of adverse grade?

A. No; I don't believe it would, because the price of the haul would be regulated to cover the different things that you have mentioned.

Q. The efficiency of the loading crew loading the trucks? A. It would.

Q. The speed of the type of truck, itself?

A. That would.

Q. The ability of the truck driver?

(Testimony of Clarence C. Vander Jack.)

A. Correct. [236]

Q. The type of logs being handled?

A. I hardly think that would have anything to do with it.

Q. There would not be any such thing as—well, strike that.

You could not say there is a normal?

A. Yes; there is a normal.

Q. Normal is simply an average?

A. It is an average, that is right.

Q. There would be quite a range between low and high, would there not?

A. Not on a specific truck, the specific trucks you mention. If it is a six-wheeler with a Diesel engine, then it has to have a certain type of log or it cannot be maintained.

Mr. Goodwin: Very well.

The Referee: Proceed.

Q. (By Mr. Hilger): I believe the question was, do you know whether there is an average?

A. There is an approximate average.

Q. For each of the trucks in that area at that time?

A. That type of truck, yes.

Q. What is the average?

Mr. Goodwin: We object to that question, your Honor. I believe the witness' testimony on voir dire makes it obvious that the answer to this question would be purely conjectural. No proper foundation is laid; no setting forth all the things Mr. Vander Jack must have taken into consideration.

(Testimony of Clarence C. Vander Jack.)

Mr. Hilger: I will lay a further [237] foundation.

Q. In arriving at a hauling rate, first of all, by way of preparation, are you familiar—were you familiar in 1953 with the automotive operation of log trucking and hauling enterprises?

A. I was.

Q. Your company owned and operated some 17 trucks, did it not? A. It did.

Q. And you were a managing officer of that company? A. I was.

Q. Was it your duty to compute the cost of the operations of those trucks?

A. That is right.

Q. Did you do so? A. I did.

Q. Further in your duties in connection with the management of this company, you had occasion to hire a great deal of hauling done by other trucks? A. I did.

Q. And you are familiar with the manner in which hauling rates from one point to another are computed? A. I am.

Q. Are they computed with reference to all the items Mr. Goodwin has asked you about?

A. They are.

Q. Those rates, after taking into consideration the terrain, adverse grades, distance, kind of logs, loading and unloading, are designed to produce a certain gross per day for the use of the truck?

A. That is right.

Q. And what is the average gross per day that

(Testimony of Clarence C. Vander Jack.)

is used as the basis of computation for the use of a truck in hauling logs?

Mr. Goodwin: Just a minute.

The same objection, your Honor—calling for a purely [238] conjectural answer. That is abundantly clear.

The Referee: Well, it is an opinion, I take it, of an expert. The objection is overruled. He may answer.

A. At that particular time, in that particular area, due to the type of terrain, the roads, and so forth, a truck, in the summer of 1953, had to earn \$150 per day.

Q. (By Mr. Hilger): Gross earnings?

A. Gross earnings—or you could not stay in business.

Q. Computed on a monthly basis, what did you figure a truck was supposed to earn to come to the average? A. \$3,000.

Q. \$3,000 per month gross earnings per month?

A. That is correct.

Q. That was in Humboldt County in the summer of 1953? A. That is right.

Mr. Hilger: We will offer this as the Trustee's next.

Mr. Stark: What is it?

The Referee: A summary, as I understand, of the last exhibit.

Mr. Hilger: Part of the records of Snow Camp Logging Company prepared in September, 1953.

(Testimony of Clarence C. Vander Jack.)

It has a name on it, "Snow Camp Truck Earnings, March 15 to August 31, 1953."

The Referee: Trustee's No. 18.

(The summary of Truck Earnings referred to was admitted in evidence as Trustee's Exhibit No. 18.)

Q. (By Mr. Hilger): Referring to Trustee's Exhibit No. 18, [239] and the final figure over in the right-hand column, \$93,561.42, that is the total earnings for 66 months of truck operation?

A. That is correct.

Q. That is a matter of mathematics. Sixty-six months of operation at \$3,000 a month would be \$198,000. Your actual record has revealed, on Trustee's Exhibit No. 18, \$93,561.42.

A. That is right.

Q. How do you account for the difference between the earnings reflected on the records and the average required earnings?

A. Well, a great deal, of course, was the inefficiency of the help at Mr. Peters' mill holding up our trucks. That more or less accounts for most of it. Of course, there were normal breakdowns which we had to take into account.

Q. The delay in unloading the truck would cut down its earnings? A. It would.

Q. At the time this schedule was being prepared in September, 1953, did you observe your operations there at Peters' mill and elsewhere?

A. I did, yes.

(Testimony of Clarence C. Vander Jack.)

Q. Now, there is \$105,000 difference between the average earnings of a truck and the actual earnings through this period. As a result of your observation of your operations during that period of time, did you form any opinion as to the amount of the truck loss that was attributable to the delay at Peters' mill? A. I would say 30 per cent of it.

The Referee: One-third?

A. Thirty per cent—about 30 per cent. [240]

Q. (By Mr. Hilger): Does that mean 30 per cent of the truck hours during that period of time due to delay in unloading at Peters' mill?

A. As a result of that, yes.

Q. Now, you heard the testimony here from the depositions that there was a certain decrease in deliveries during the month of October?

A. I did.

Q. Is that a fact? A. It is a fact, yes.

Q. What was the reason for it?

A. Well, of course, we were not being paid as we billed. That was somewhat of a hardship on us. At the time there was the harassment at the dump. Of course, we could not deliver.

Q. The dump was plugged?

A. The dump was plugged in October. Of course, that cut down our deliveries.

Q. October was the time of the three-day plug?

A. I believe it was.

Q. Did the mill have plenty of logs for its operations at all times during the month of October?

A. It did.

(Testimony of Clarence C. Vander Jack.)

Q. Did you ever have, in May, 1953, any discussion with Mr. Henry Welch, at that time superintendent at Timber, Inc.'s mill? A. I did.

Q. Did you discuss——

Mr. Stark: Wait a minute.

Mr. Hilger: I will ask him.

Mr. Stark: Wait a minute.

Mr. Hilger: There isn't any question.

Mr. Stark: I know. [241]

Mr. Hilger: Reserve your objection until I ask the question.

Q. What would be the nature of the conversation with Mr. Welch, and, first of all, who was present other than yourself and Mr. Welch?

A. Just Mr. Welch and myself, I believe.

Q. That was May of 1953? A. It was.

Q. What was the subject of the conversation?

A. I was interested in their mill, just to see what it was doing. I asked Mr. Welch what the overrun was.

Q. What did he say?

A. He said about 30 per cent.

Mr. Goodwin: Just a minute.

We object on the ground that it is incompetent, irrelevant and immaterial; no proper foundation laid. There is no showing of Mr. Welch's position in the matter other than that he was superintendent of the mill. There is no foundation to show that the statement or admission of Mr. Welch would bind this claimant. We object to the question and move to strike on all those grounds.

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: I don't see what the overrun of the mill has to do with the obligations to him.

Mr. Hilger: As to that, your Honor, it has to do with the performance by this company of their obligation to deliver logs of camp-run quality. If the recipient cut more out of them than he paid for in the log scale, it would go to show very satisfactory performance on behalf of Snow Camp Logging Company, and [242] if the mill superintendent does not know what his overrun is, I fail to see who, in the organization, would know. He has testified that he was the mill superintendent. He did state what the overrun was, and gave the percentage. He was bound to know.

Mr. Stark: The point is not whether the mill superintendent knows what he is talking about. We are raising the objection that this is an extrajudicial statement, seeking to bind this claimant without a foundation laid to bind the claimant.

The Referee: Is there any doubt about his being the superintendent?

Mr. Stark: None whatever.

The Referee: This has to do with the operation of the mill, does it not?

Mr. Stark: Correct. But we should have the opportunity to have him here for cross-examination.

The Referee: But he was superintendent of the mill.

Mr. Hilger: You can produce him.

The Referee: You can produce him.

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: I think your Honor recognizes the obvious impossibility of that at this time, if there is no showing of agency other than the mere fact that he was our mill superintendent.

The Referee: I think you are bound as to the operation of the mill. If he does not know, then he is not a very competent superintendent.

Mr. Stark: He might well not know the number of feet of [243] lumber.

The Referee: There is no testimony as to the feet of lumber. He says 30 per cent overrun. The objection is overruled and the motion to strike is denied.

Q. (By Mr. Hilger): By "overrun," what do you mean, Mr. Vander Jack?

A. The difference between the log scale and the lumber scale that comes out of the mill. On a million feet of logs, he would get one million three hundred thousand feet of lumber out of that. That is not uncommon in a gang-type mill. I wanted to see how it was going, so I asked him, which is about what I thought it should have done.

Mr. Hilger: Thank you. That is all.

The Referee: Cross-examine, or do you want to take a recess now?

Mr. Goodwin: It is going to be rather lengthy.

The Referee: Very well. Take an adjournment until 1:30.

Mr. Stark: I have an engagement.

The Referee: Come back at 2:00, then.

Mr. Stark: We have two witnesses down here

(Testimony of Clarence C. Vander Jack.)

that are not employed by us. It is imperative that they get back to their business today.

The Referee: Is there any objection to taking them out of order?

Mr. Hilger: None whatsoever.

The Referee: Bring them up and put them on right after 2:00 o'clock. [244]

Mr. Stark: Thank you, your Honor.

(Adjourned to 2:00 p.m.) [245]

Afternoon Session

Same appearances.

The Referee: Ready, gentlemen?

Put your witnesses on out of order.

Mr. Stark: For the record, I have a photostatic copy of the invoices to replace the originals. I have given a set to opposing counsel. There is a set for the Court.

The Referee: Thank you, Mr. Stark. Call your witness.

Mr. Goodwin: Mr. Gordon Walker, will you please take the stand?

GORDON WALKER

called as a witness for the Respondents; sworn.

The Referee: Your name is Gordon Walker?

A. That is right.

Direct Examination

By Mr. Goodwin:

Q. Your name is Gordon Walker?

A. That is right.

Q. Where do you reside?

A. Arcata, California.

Q. How long have you lived in Humboldt County, California? A. Since 1951.

Q. What is your business or occupation?

A. I am a logger, a contract logger.

Q. What is the name of your company?

A. Walker Logging Company.

Q. Where does your company operate?

A. In the Redwood Creek area out of Blue Lake. [246]

Q. Are you familiar with the area formerly being logged by Snow Camp Logging Company, the Vander Jacks?

A. Yes; we logged adjacent to them.

Q. Your timber is adjacent to that?

A. That is right.

Q. You have been logging in there since about 1951, you say? A. That is right.

Q. As a contract logger for whom?

A. Mutual Plywood.

Q. By that, you did the logging of their timber

(Testimony of Gordon Walker.)

on a contract basis? A. That is right.

Q. That was a complete logging service?

A. That is right.

Q. From the woods to the mill?

A. From the woods to the mill.

Q. Now, are you familiar with the quality of timber in that area, Mr. Walker? A. Yes.

Q. How much timber have you logged out in your operation since 1951, approximately?

A. Oh, around one hundred million.

Q. One hundred million board feet of logs?

A. That is right.

Q. Now, are you acquainted with the sawmill in the Redwood Creek area known as the Timber, Inc., sawmill? A. Right.

Q. That is a gang mill, is it not?

A. That is right.

Q. Were you familiar with that gang mill in 1953? A. Yes. [247]

Q. Did you have occasion to be in that vicinity in 1953?

A. Yes; I went by every morning and night, and sometimes in the middle of the afternoon.

Q. You were living in Arcata then?

A. Yes.

Q. To get to your own operations from Arcata and back again, you went past that sawmill regularly? A. That is right.

Q. You were familiar, were you not, with the Snow Camp, the Vander Jack operation, in 1953?

A. Yes.

(Testimony of Gordon Walker.)

Q. On your travels and in your business up there, did you have occasion to see Snow Camp logs being delivered to the Timber, Inc., mill?

A. Yes.

Q. Did you have occasion to see Snow Camp trucks delivering logs to them? A. Yes.

Q. Did you have occasion to see Timber, Inc.'s, cold deck of logs at the mill in 1953?

A. Yes.

Q. Now, are you familiar with what a gang log is, Mr. Walker? A. Yes.

Q. The logs being delivered to Timber, Inc.'s, mill were primarily gang logs, were they not?

A. That is right, small.

Q. Was there any difference, generally, during 1953, in the quality of gang logs being delivered to Timber, Inc.'s, mill by the Vander Jacks and those delivered to town by Vander Jack?

A. It seemed in my opinion the better logs were headed for town.

Q. The better logs, in your opinion, were taken to town? A. Yes. [248]

Q. Generally, what quality logs went to Timber, Inc.'s, mill?

A. They did not look so good. They were small, crooked, knotty.

Q. Now, it is possible, is it not, Mr. Walker, in a logging operation, to sort logs on a landing and send the good logs in whatever direction you want to, and the poorer logs in whatever direction you want to, is that right? A. Yes; you can.

(Testimony of Gordon Walker.)

Q. In all this logging season in 1953, in your opinion, observing both the town deliveries and the sawmill deliveries, the better logs went to town?

A. Yes; the better logs went to town, in my opinion.

Q. Mr. Walker, do you, and did you in 1953, operate your own fleet of trucks?

A. That is right.

Q. How many trucks did you have in those days? A. Thirteen.

Q. Also, did you or did you not hire gyppo's, or independent trucks? A. Yes.

Q. You are familiar with the average earnings, what the earnings should be for those types of trucks in 1953 on a dairy basis?

A. We figured \$100 to \$110 they would be paying their own way.

Q. With that terrain, and that timber on the trucks? A. Yes.

Q. \$100 to \$110 would pay their own way? [249]

The Referee: A week?

A. A five-day week.

Q. (By Mr. Goodwin): Generally, Mr. Walker, in the logging industry is the operation of your own trucks by loggers a profitable operation?

A. No; we figure it is just a necessary evil to have trucks.

Q. A necessary evil, because you have to get the logs to market?

(Testimony of Gordon Walker.)

A. As part of your contract you have to have them.

Q. Generally, in the industry, they are not a paying proposition, is that right?

A. That is right.

Mr. Goodwin: That is all.

You may cross-examine.

Cross-Examination

By Mr. Hilger:

Q. You say you saw logs going from the Snow Camp operation to town during the summer of 1953?

A. That is right.

Q. You just passed them on the highway as you went to and from?

A. I just passed them on the highway as I went to and from, and out of the county road.

Q. And they were loaded aboard, under way, and would meet you on the highway and go on by?

A. That is right.

Q. That is the extent of your examination of those logs, was it not?

A. Yes.

Q. That is solely on what you base your statement that you thought they were better than the Peters logs, is it not? [250]

A. Well, in the logging game you always take a second look at a load of logs. That is your business, to see what timber is going out. You always take a second look at logs.

Q. That is the only inspection you made?

(Testimony of Gordon Walker.)

A. That is right.

Q. You have no other basis for the statement that they were better than the Peters logs?

A. No; what I saw on the truck and saw on the cold deck.

Q. It is a fact, is it not, that you began selling logs to Peters in the fall of 1953?

A. I never have sold logs to Peters.

Q. The Walker Logging Company has?

A. Mutual Plywood.

Q. You delivered logs to the Peters mill?

A. Yes; we delivered them under Mutual's contract.

Q. You were paid for the delivery of the logs?

A. By Mutual.

Q. You are still delivering logs there, are you not? A. Yes.

Q. Do you maintain any records? A. Yes.

Q. Reflecting your log deliveries? A. Yes.

Mr. Hilger: That is all.

Redirect Examination

By Mr. Goodwin:

Q. Mr. Walker, the logs that were delivered to Timber, Inc., by you belonged to Mutual Plywood Corporation? A. Right.

Q. And they were delivered there by you at their instructions? [251]

A. Right.

Q. Payment was made by Timber, Inc., to Mutual? A. That is right; Mutual paid us.

(Testimony of Gordon Walker.)

Q. For your logging? A. Yes.

Q. That was in accordance with a contract between you and Mutual Plywood Corporation?

A. Yes.

Q. Did you deliver any logs to Timber, Inc.'s, sawmill as long as Vander Jacks were delivering logs there? A. Not to my knowledge, no.

Q. The deliveries started after he quit?

A. Yes.

Q. And your observation of those logs on the trucks is predicated on your having logged one hundred million feet of logs out of that same area?

A. That area, yes.

Mr. Goodwin: Thank you.

Recross-Examination

By Mr. Hilger:

Q. Now, when did you begin delivering logs to the Peters mill?

A. I could not tell the exact date. It was after Vander Jack pulled out of there, I know.

Q. You are familiar with the log trucking situation in Humboldt County, and have been for years? A. Yes.

Q. You have trucks of your own?

A. Yes.

Q. You are familiar with the fact that hundreds of log trucks were operating in Humboldt County in 1953, even today? A. Yes.

Q. You are familiar, also, that most of the op-

(Testimony of Gordon Walker.)

erators of [252] trucks make a profit on their hauling?

Mr. Stark: Objected to on the ground that no proper foundation is laid; it is hypothetical; not within the realm of this man's knowledge; not proper recross.

The Referee: I think it is. If that is your objection, it is overruled.

Q. (By Mr. Hilger): You are aware that many, if not most of the log truck operators, make money and pay their equipment out, are you not?

A. Well, I would not say all of them, no.

Q. Many of them?

A. There are independent operators on contract work.

Q. They operate the same kind of trucks you do, don't they?

A. I said we have our trucks for a necessary evil. We have to have them in order to carry our contract out.

Q. The question was, they operate the same kind of trucks you operate, don't they?

A. Yes.

Mr. Hilger: That is all.

Mr. Goodwin: May this witness be excused, your Honor?

The Referee: Yes.

Mr. Goodwin: Thank you very much.

(Witness excused.)

ROBERT H. BARRETT

called as a witness for the Respondents, sworn.

Direct Examination

By Mr. Goodwin:

Q. Mr. Barrett, by whom are you [253] employed?

A. The Arcata Plywood Corporation.

Q. That is in Arcata, California? A. Yes.

Q. Do you live in Arcata, or Eureka, California?

A. Eureka, California.

Q. How long have you lived in Humboldt County?

A. I am just completing my seventh year.

Q. What is your occupation with the Arcata Plywood Corporation?

A. I am their timber and line manager.

Q. As such, what do your duties include?

A. Well, manager, and I am responsible for the raw materials for all four of their ply mills.

Q. Have you ever done scaling or grading of logs? A. Yes.

Q. By whom were you employed in 1953?

A. I was manager for the Northern California Log Scaling and Grading Bureau.

Q. And what was the Northern California Log Scaling and Grading Bureau?

A. Well, it was a co-operative venture by the industry a non-profit organization that was set up by the industry. It elected a ten-man board of

(Testimony of Robert H. Barrett.)

directors from the industry, five loggers and five manufacturers.

Q. What did this bureau do?

A. They were a disinterested third party that was set up between the buyer and the seller of logs.

Q. They measured and graded logs. That was for the various people in the logging and lumber industry in that area? [254] A. Yes.

Q. That was done on the basis of charging so much per thousand, or month, for a man to scale?

A. Yes, it was cost plus overhead.

Q. Was this bureau a member of the Northwest Advisory Committee at that time? A. Yes.

Q. During 1953, did the Northern California Log Scaling and Grading Bureau grade logs?

A. Yes.

Q. Or simply scale?

A. We scaled and graded.

Q. When was the grading of logs commenced?

A. Well, grading peelers was started from the inception, but the 1st of April, 1953, we started grading sawmill logs, which had not been graded prior to that time.

Q. Were these for delivery into the Arcata market area? A. Yes.

Q. To your knowledge did any mills in that area start buying saw logs on grade? A. Yes.

Mr. Hilger: I will object to this line of questioning, your Honor. We are bound by the contract, which says logs provided shall be camp run.

Mr. Goodwin: It does not say any such thing.

(Testimony of Robert H. Barrett.)

Mr. Hilger: I believe it does.

The Referee: Where is your contract?

Mr. Goodwin: Well, even if it does, your Honor, still the contract, whatever it says, the contract is tied into the Arcata market. [255]

The Referee (Reading): "Gang type logs shall be anything up to 32 inches of the butt and down to 8-inch tops. Buyer agrees to accept all logs up to 40 per cent defective."

Mr. Goodwin: It does not say what grade it has to be.

The Referee: Will accept any log.

Mr. Goodwin: I have a right to establish the general character and quality of the log within the size diameter.

The Referee: It says any log.

Mr. Hilger: We will stipulate that certain logs in the Arcata area were graded logs, and even before.

Mr. Goodwin: Fine.

Mr. Hilger: For certain mills.

The Referee: You mean certain mills other than referred to here?

Mr. Hilger: That is right.

Mr. Goodwin: Started buying logs on grade in 1953.

Mr. Hilger: I would not say "started." Some time they did; some time they did not.

Q. (By Mr. Goodwin): Mr. Barrett, are you familiar with the Timber, Inc., mill in the Redwood Creek area? A. I am.

(Testimony of Robert H. Barrett.)

Q. Were you familiar with that sawmill in 1953?

A. Yes.

Q. Did you have any connection then, or thereafter, with that sawmill?

A. Not directly, no, I did not. There [256] was a request for us to scale their logs.

Q. Now, in late 1953 was your bureau requested to scale some logs for Timber, Inc.? A. Yes.

Q. And what were the logs? Were they coming out of a cold deck at the mill?

A. Well, we were requested to scale the logs that were in the pond at that time.

Mr. Margolis: I will interpose an objection here, your Honor. No proper foundation has been laid. The witness says "at that time," I think the time might become important.

Mr. Goodwin: He said late 1953.

Mr. Margolis: I think you should fix it definitely.

Q. (By Mr. Goodwin): Can you say more specifically about when it was you were doing this scaling?

A. To the best of my knowledge, your Honor, it was during the winter months, the last part of 1953, or the first few months of 1954. We scaled the logs in the pond over a period of once or twice a week for a period, if I recall correctly, a period of two or three months.

Mr. Hilger: May I ask a question on voir dire?

(Testimony of Robert H. Barrett.)

The Referee: Yes.

Q. (By Mr. Hilger): Didn't you keep records of the scaling service performed?

A. The scaling bureau did.

Q. That would reveal the precise dates the scaling was done, would it not?

A. I believe so.

Q. (By Mr. Goodwin): Are those records available?

A. I believe the scaling bureau is bound by its constitution [257] and bylaws to retain the records for a period of two years.

Q. As a matter of fact, you tried to find the records, Mr. Barrett, without any luck?

A. Yes.

Mr. Margolis: May I ask a question or two?

The Referee: Surely.

Q. (By Mr. Margolis): Were copies of those records furnished to Timber, Inc., sir?

A. Yes.

Q. How soon after they were gotten together were they furnished to Timber, Inc.?

A. They were furnished them within about a three- or four-day period every week, and then each week.

Q. Can you tell with some degree of accuracy the month you started to do scaling? Was it December, November, or January?

The Referee: He said the winter.

Mr. Hilger: The winter of 1953.

The Witness: And early 1954. I would not know

(Testimony of Robert H. Barrett.)

exactly. I remember the weather, which was as it would be at that time.

Q. (By Mr. Margolis): Could you say definitely it was not later than the 1st of November?

A. I could definitely say that.

Q. You did not do this before the 1st of November?

A. I am pretty sure I can say definitely I did not start before the 1st of November, 1953.

Q. (By Mr. Goodwin): Do you remember about how many logs you scaled on this project?

A. As I say, I did it several times, personally. I did it three or four times, and [258] scaled probably 600,000 feet, and our check scaler for the industry did it several times. I would estimate his to be the same, or a little less. Probably the total was a little over a million feet of logs actually scaled.

Q. Around a million feet of logs scaled on this project.

Now, you had occasion, in connection with scaling the logs, to see the character and quality of those logs? A. Yes.

Q. How would you describe the logs, Mr. Barrett? Were they superior, average, or poor?

Mr. Hilger: We object to this. There has been no foundation laid, no showing that this witness knows who supplied the logs. He already testified that he did not even come on the premises for that purpose until two weeks after we quit deliver-

(Testimony of Robert H. Barrett.)

ing logs. The work began in the pond by scaling there two weeks later, on logs of which he did not know the source.

Mr. Goodwin: I will tie it in later by another witness. Obviously, I cannot ask the witness to identify the logs. We will tie it in. I suggest that you reserve ruling on the objection.

The Referee: I will do that.

Mr. Margolis: Prior to closing the morning session the Court and ourselves were informed that two witnesses were to be called this afternoon. Do I understand there is another witness here?

Mr. Stark: He did not say that. [259]

Mr. Margolis: I asked, was that the statement before we adjourned?

Mr. Stark: Two witnesses to call out of order.

Mr. Margolis: Do I understand your Honor's ruling to be——

The Referee: I have not made a ruling.

Mr. Margolis: Your ruling on the objection will be reserved?

The Referee: Yes, subject to its being tied in by other witnesses, if such are produced.

Mr. Margolis: And if they are not, we are not precluded from making a motion to strike?

The Referee: The objection will be sustained if it is not tied in.

Mr. Margolis: Very well.

Mr. Goodwin: Will you read the question?

(The question referred to was read by the reporter as follows:

(Testimony of Robert H. Barrett.)

“Q. Now, you had occasion, in connection with scaling the logs, to see the character and quality of these logs? A. Yes.

“Q. How would you describe the logs, Mr. Barrett? Were they superior, average, or poor?”)

The Referee: Does that come under scaling or grading?

Mr. Goodwin: Just as to quality, your Honor.

The Referee: That would be grading.

Mr. Goodwin: That would be grading, yes, [260] sir.

Mr. Hilger: It is irrelevant.

The Referee: Under the contract, wouldn't it be irrelevant?

Mr. Stark: The contract says, first (reading):

“That sellers agree to furnish and buyer agrees to purchase all the logs required by buyer in the operation of any or all of his mills in the Redwood Creek ranch area.”

But Paragraph 5 says (reading):

“Gang type logs shall be anything up to 32 inches on the butt and down to 8-inch tops. Buyer agrees to accept all logs up to 40 percent defective.”

Mr. Goodwin: Your Honor will recall that in some of the various depositions introduced, Mr. Hilger had considerable testimony in there showing these camp run are good quality. I think we have a right to rebut that.

Mr. Hilger: The same objection. I think the only thing relevant to the contract is to know how

(Testimony of Robert H. Barrett.)

much he looked at were less than 40 per cent sound.

Mr. Goodwin: The depositions go into great length.

The Referee: You did not object to the testimony going in.

Mr. Goodwin: I think it is material to show whether they were high graded or low graded on these.

The Referee: But aren't you bound by the terms of the contract, regardless of the testimony, because you did not object to it? [261]

Mr. Goodwin: Yes, sir, we are bound by the terms of the contract.

The Referee: I think the suggestion made by Mr. Hilger is correct, if you can show there was more than 40 percent.

Mr. Hilger: How many were less than 40 percent sound? That is the only thing that is material.

Mr. Goodwin: Your Honor, that is in there for the purpose of defining the meaning of "merchantable."

Mr. Hilger: That is right. Anything beyond that is not merchantable. That is the reason for it.

Mr. Goodwin: Certainly we are able to show that in the operation we did not get the camp run log we were entitled to.

The Referee: You just said there was not any camp run involved in here.

Mr. Stark: The words "camp run" are not contained in the contract.

(Testimony of Robert H. Barrett.)

The Referee: Therefore, they are not bound by camp run. You are bound by the language of the contract.

Mr. Goodwin: That is correct, your Honor, but certainly, reading the entire contract, shows it may be established. The record already shows that Mr. Vander Jack only gave us part of the gang logs. From the testimony of Gordon Walker, the good logs went to town and the poor logs to us. I suggest it is rebuttal evidence to the evidence Mr. Hilger already introduced. I think it is material.

The Referee: I think the objection is good; I will [262] sustain it. I am not saying you cannot go into it on the 40 percent basis.

Q. (By Mr. Goodwin): Mr. Barrett, in your examination of those logs, did you observe any logs more than 40 percent defective? A. Yes.

Q. Did you see there in the pond in your scaling, cull logs?

A. Yes, there were a great many culls—actually cull logs.

Q. Those logs would be more than 40 percent defective?

A. Our rules at that time—I was not aware of this contract for 40 per cent—the scaling bureau rule was any log was considered merchantable down to one-third. It could be two-thirds defective, what I am trying to say, and still be a merchantable log.

Q. You saw logs in there more than 40 percent defective? A. Yes.

(Testimony of Robert H. Barrett.)

Q. And did you find more than the average amount of cull logs and logs exceeding 40 percent?

Mr. Hilger: I object to that. The only thing material is how much he found over 40 percent defective.

Mr. Goodwin: That is what I asked.

Mr. Hilger: No; you asked was there more than average? We want to know how many there were in feet. That is all that is material.

The Referee: The objection is sustained on the last question.

Mr. Goodwin: That it was more than [263] average?

The Referee: No.

Read the question.

(Question read by reporter.)

The Referee: On that the objection is sustained. You have a compound question there. Part of it is objectionable.

Q. (By Mr. Goodwin): Mr. Barrett, did you find more than the average amount of logs in that pond that exceeded 40 per cent defective?

Mr. Hilger: We object to that.

The Referee: Again you are using the same term.

Mr. Stark: That is what the contract says, 40 percent defective.

The Referee: But average.

Mr. Goodwin: The average volume, your Honor, of logs that exceeded that.

(Testimony of Robert H. Barrett.)

Mr. Hilger: That is not material to the contract. The only thing material is the existence of logs there 40 percent defective, and the actual amount; not whether more than average or less than average, but the amount.

The Referee: That is the vice of the question.

Q. (By Mr. Goodwin): You discovered logs at that time that were more than 40 percent defective?

A. Yes.

Q. What percentage of all the logs in the pond were more than 40 percent defective?

Mr. Hilger: I object again. I think we are entitled to an answer in board feet. That is the only thing related to the [264] contract.

The Referee: Wait a minute. Is there anything in the contract about board feet?

Mr. Hilger: Well—but anything up to 40 percent defective.

The Referee: You have to get a basis for your 100 percent, haven't you?

Mr. Hilger: What I am getting at is this: As I understand the question, he is using percentage in lieu of average to get the same answer—what percentage of logs were 40 percent defective. I think the only thing material is how many board feet were more than 40 percent defective, of the logs in there.

Mr. Stark: I submit, if your Honor please, that this scaler or grader in the pond could not possibly, nor any other human being, look at a log and tell

(Testimony of Robert H. Barrett.)

how many board feet would work out, defective or sound.

The Referee: I don't think you are bound by board feet at all, myself.

Mr. Stark: That comes out at the other end of the mill.

The Referee: But I don't think it is fair to either side, or proper to either side, to get the reply you are trying to get. I think you are entitled to the reply of how many actual logs were scaled, and then on that basis, what was or was not more than 40 percent defective.

Mr. Goodwin: He has testified he scaled something around [265] one million feet total, already.

The Referee: Yes, I know he has.

Mr. Hilger: We want to know how much of that was 40 percent defective or more.

Mr. Stark: Let him answer that question.

Q. (By Mr. Goodwin): Can you answer that question?

A. Really, that is a difficult question. As I recall, your Honor—if I am permitted—that we had between a total overall percentage of deduction with the brokers between 30 and 35 percent. With a good many of those logs, the net deductions were probably on an estimation, as I say; it was probably from 10 to 15 percent of the total price claimed for all the logs that actually were cull logs.

The Referee: You have your answer there.

Q. (By Mr. Goodwin): And, of course, a cull

(Testimony of Robert H. Barrett.)

log, Mr. Barrett, would be one more than 40 percent defective?

A. Yes—one, in fact, more than $66\frac{2}{3}$ percent defective.

The Referee: As I understand, there were figures showing this, and the good logs that were given to the respondent here?

The Witness: Yes.

The Referee: On your scaling ticket?

A. We gave a detail of each log, yes.

Mr. Goodwin: That is all.

Cross-Examination

By Mr. Hilger:

Q. You don't know who delivered those logs to the Peters' mill of your own knowledge? Did you see them [266] delivered?

A. I saw a great many logs delivered by Snow Camp, yes.

Q. When did you see them delivered, in relation to when you did this scaling?

A. Throughout the entire year.

Q. In relation to when you did the scaling, when was the last time you saw a Snow Camp delivery go out there?

A. I cannot tell that, Mr. Hilger. I was there probably once a week. We did the work for Walker and Mutual close by. I was in that area once a week. Probably I saw logs being delivered at least the last two weeks they were delivered there.

Q. How long after the last two weeks did you

(Testimony of Robert H. Barrett.)

begin making scale for Mr. Peters and Timber, Inc?

A. This has been several years ago. I am following strictly my recollection.

Q. As best you recall, Mr. Barrett?

A. I would say Timber, Inc., requested us to do the work probably within a one- to two-month period after the logs stopped being delivered in there; perhaps during that period.

Q. You would estimate about a month after Snow Camp ceased deliveries that you made this scale? A. Shortly thereafter, yes.

Q. Walker had been delivering in that interval between the time Snow Camp ceased and you began scaling?

A. Yes. A short period elapsed there before Walker began.

Q. He had been delivering logs three weeks, at least, before you began making your scaling?

A. Yes. [267]

Q. Did you scale the pond and deck?

A. We scaled the logs in the pond. A lot of the logs were scaled. We scaled everything in the pond one week that we would be in, but not out of the deck. We would get those the next week, yes.

The Referee: You mean by that that all of your work was done scaling out of the pond?

A. Yes, your Honor.

Q. You did not scale out of the cold deck?

A. Not out of the cold deck direct. It is much more accurate to scale the logs in the water.

(Testimony of Robert H. Barrett.)

Q. (By Mr. Hilger): Do you know anybody other than Walker Logging Company who made any deliveries in there to the Peters mill?

A. No, I don't. The biggest percentage of logs at that time were not branded. Walker's logs always were branded.

Q. You are familiar with the Timber, Inc., mill, and it was a gang mill? A. Yes.

Q. It had a capacity variously described from 32 to 36 inches as the largest size it could accommodate? A. Yes.

Q. That is, a log that has to be 36 inches or less is considered a small log. That is the largest it can take.

The Referee: Wasn't the limit 35?

Mr. Hilger: Thirty-five up to thirty-two is the diameter under the contract. I think the mill could accommodate, I think, up to 36.

The Referee: I see. [268]

Q. (By Mr. Hilger): You are familiar with the fact that at that time there was not another gang mill in operation in Humboldt County except at Fortuna? A. That is right.

Q. There was no gang mill in Arcata at that time? A. No, at that time there was not.

Mr. Hilger: That is all.

Mr. Goodwin: That is all.

May this witness likewise be excused?

The Referee: He may.

(Witness excused.)

The Referee: Now do you want to commence the cross-examination of Mr. Vander Jack?

Mr. Goodwin: Yes, your Honor.

CLARENCE C. VANDER JACK

recalled as a witness on behalf of the Trustee; previously sworn.

Mr. Stark: Mrs. Blair, would you read your notes from page 139? Read the questions that relate to the condition of the log dump.

(Record read by the reporter as follows:)

“Q. Now, you heard the testimony here from the depositions that there was a certain decrease in deliveries during the month of October?

“A. I did.

“Q. Is that a fact? A. It is a fact, yes.

“Q. What was the reason for it? [269]

“A. Well, of course, we were not being paid as we billed. That was somewhat of a hardship on us. At the time there was the harassment at the dump. Of course, we could not deliver.

“Q. The dump was plugged?

“A. The dump was plugged in October. Of course, that cut down our deliveries.

“Q. October was the time of the three-day plug?

“A. I believe it was.

“Q. Did the mill have plenty of logs for its operations at all times during the month of October? A. It did.”

(Testimony of Clarence C. Vander Jack.)

Cross-Examination

By Mr. Goodwin:

Q. As I understand your testimony, Mr. Vander Jack, your deliveries during the month of October did decline from what they had previously been. They declined rather sharply, as a matter of fact, did they not?

A. I believe the records would show that.

Q. The last delivery was about October 21st?

A. That is right.

Q. Now, one of the contributing factors, as I understand your testimony, to the decline of deliveries, was the fact that the dump was plugged a great deal during that time.

A. It was, on one occasion.

Q. Only one occasion?

A. As I recall, during the latter part of the deliveries there was one period there [270] after I even received a letter from Mr. Peters when all the gang logs was plugged.

Q. That would be in the October period?

A. Yes.

Q. For a substantial time?

A. Possibly a day, two days. I could not recall at the minute.

Q. That only happened once during October?

A. I believe that would be all.

Q. When would that be?

A. I could not tell the exact date.

(Testimony of Clarence C. Vander Jack.)

Q. Would it be within the last two weeks of your deliveries? A. It would have been.

Q. Now, Mr. Vander Jack, I would like to ask you to read aloud, if you will, your testimony taken here in this court on November 7, 1956, directing your attention to page 17 thereof, starting with line 10, down to and including line 24 (handing transcript to the witness). Would you read that aloud, please?

A. (Reading): "Q. Would you describe the condition there at that time?

"A. Well, our heavy production started in May and toward the latter part of May we began to get confusion in the log pond. We had several, during the summer there were several times the dump itself became plugged. There could be no further deliveries into the pond for periods of two or three days.

"Q. How long did that condition persist?

"A. Up until the end of September. [271]

"The Referee: 1953?

"A. Of 1953.

"Q. (By Mr. Hilger): Did it persist up until the time you ceased delivering logs there on October 21?

"A. I would say not quite until then. There was a period of about two weeks until the end of the operation which Mr. Peters had that the pond was clear."

Q. (By Mr. Goodwin): That was your testimony? A. That was my testimony.

(Testimony of Clarence C. Vander Jack.)

Q. Your testimony now is that within the last two weeks the pond was plugged at least two days?

A. That is my testimony now since reviewing and hearing the depositions. That was a number of years ago that all occurred. It refreshed my memory somewhat.

Q. Then would it be your desire to correct that testimony? A. With this addition, yes.

Q. You also testified that before you left you were not being paid as you billed. You mean by that, don't you, that you were not being paid the amount that you billed Timber, Inc.?

A. That is what I mean.

Q. You were being punctually paid on pay-days, were you not? A. I was.

Q. You were also being paid on Mr. Montgomery's scale? A. Correct.

Q. So the difference was simply one where you billed a certain amount per thousand and got paid a lesser amount per thousand? [272]

A. That is right.

Q. Now, in that regard you have seen, have you not, the cancelled checks, or photostatic copies, that are in evidence covering this period of dispute between you and Mr. Peters?

A. I received all the checks, but I had to cash them along with the notation on them, because I needed the money.

Q. Those endorsements of Snow Camp on the various checks are your own?

A. Are Snow Camp's endorsement.

(Testimony of Clarence C. Vander Jack.)

Q. You deposited the checks and used the proceeds, is that right? A. We did.

Q. And the notations were on the checks, "Full Payment"?

A. They were on there, but I also sent letters covering that. We did object to them.

Q. I understand that. This was during the time the dispute was going back and forth between you and Mr. Peters as to the price?

A. That is right.

Q. By the way, that dispute as to price started when, around July or August?

A. I think it started in July. We could easily see. That has been submitted here.

Q. It went through clear until the time you quit delivering logs? A. That is right.

Q. And, knowing the dispute existed, nevertheless you did endorse the checks?

Mr. Margolis: We object to the question on the ground that it is argumentative. The checks speak for themselves.

The Referee: That is true. [273]

Mr. Goodwin: Very well, your Honor.

Q. Now, Mr. Vander Jack, you submitted a statement, did you not, to Timber, Inc., for the logs that were delivered by you in the last half of October?

A. All those we had scale slips for were submitted, yes.

Q. Is it your testimony that logs were delivered in the last half of October that were not included

(Testimony of Clarence C. Vander Jack.)

in your billings? A. It is.

Q. Those were logs you testified were scaled by somebody else, or not scaled at all?

A. I don't know just what became of all of them.

Q. I beg your pardon?

A. I don't know what became of all the logs.

Q. I think you misunderstood. I believe you testified that some logs were delivered to the pond and were not scaled, or at least, if they were, you did not get a copy of the ticket?

A. That is right.

Q. That happened on October 21st?

A. During that period.

Q. Now, in that same period of time, whether these logs were scaled by the mill or not scaled, whatever happened, Mr. Montgomery was still on your payroll, was he not?

A. I haven't any recollection of that. I think whoever paid him—if Mr. Peters paid him, he would know whether he was or not. We would have to look into our records to find that out.

Q. Well, Mr. Montgomery was down the road scaling your town [274] logs, was he not?

A. He was not.

Q. He continued scaling your logs for a period of several months after that? A. He did.

Q. There was no period of time between October 20th and several months after that that Mr. Montgomery was not there?

Mr. Margolis: Just a minute.

Your Honor, we object to the question on the

(Testimony of Clarence C. Vander Jack.)

ground that it is indefinite. We have testimony here of scaling being done at the mill, the question of Mr. Montgomery moving down the road. Counsel asks the question, "There was no period of time between" the crucial period "that Mr. Montgomery was not there?" It seems to me that no proper foundation has been laid. The question is vague. We have the man either at one of two places, either at the Timber, Inc., mill or at the place down the road.

The Referee: Clarify it, counsel.

Q. (By Mr. Goodwin): Mr. Montgomery was in the immediate vicinity of the sawmill at all times, was he not, from October 20th, let's say, for a period of months after that?

A. No, he was not.

Q. Where was he?

A. He was down south of the cement bridge across Redwood Creek.

Q. That is in the area?

A. Not the immediate area.

Q. How far from the mill?

A. Approximately a mile and a half.

Q. That point was selected by you as the most convenient place [275] to scale your logs going to town?

Mr. Hilger: Objected to on the ground that it is incompetent, irrelevant and immaterial what point he selects to scale his logs going to town. That has nothing to do with the issues in this case.

Mr. Stark: He claims, if your Honor please,

(Testimony of Clarence C. Vander Jack.)

that we locked him out of delivering logs to us; that we did it by firing the scaler. He took the scaler down the road to where he could scale logs on trucks going into Arcata. He could have scaled logs going into the mill by the same token. We want to know how far away from the mill he was. If he desired scaling, or was not getting scaling, Montgomery was there to do the job for him.

The Referee: That is not the form of your question, though. Read the question.

(Question read by the reporter.)

The Referee: The objection is sustained. Logs going to town have nothing to do with the mill logs.

Mr. Stark: Yes, Judge, but don't you understand? We pin our time to about October 21st, at which time he pulls his trucks out of our mill and goes down the road with the scale.

The Referee: But——

Mr. Stark: Wait a minute. Now, he claims after October 21st when he took the scale away, thus presumably, or inferring that he was deprived of the opportunity to scale logs that were going into the mill after October 21st, when he had a scaler within a mile and half to do the scaling. [276]

The Referee: That is not the question. Why not ask what scaling Mr. Montgomery did at this other point?

Q. (By Mr. Goodwin): What scaling did Mr. Montgomery do at this point?

(Testimony of Clarence C. Vander Jack.)

A. He scaled logs going to town.

Q. From and after October 21st that was all of your production, was it not? A. It was.

Q. Let's go back to before October 21st, prior to that time Mr. Montgomery or his assistant did all of the scaling of logs delivered to the mill, did they not? A. He did.

Q. That was true up to and including the day before October 21st? Logs were scaled by Mr. Montgomery? A. No, that is not so.

Q. When did Mr. Montgomery discontinue scaling logs at the mill?

A. Three days before October 21st. That would be about October 18th.

Q. 18th? A. That is right.

Q. That is the last day Montgomery scaled there?

Mr. Margolis: He said about.

A. Yes, about.

Q. (By Mr. Goodwin): You said also that about the same day you moved Mr. Montgomery away from the mill.

A. I moved him about noon that day.

Q. On the 18th? A. Right.

Q. Did you continue log deliveries after that to the sawmill? A. We did.

Q. And there was a Timber, Inc., scaler there at that time? [277] A. There was.

Q. Those are the logs you say you never received any scale for? A. We did not.

Q. Prior to noon of October 18th the Timber,

(Testimony of Clarence C. Vander Jack.)

Inc., scaler had never scaled the logs delivered to the mill? A. Not to my knowledge.

Q. And at all times from the start of the contract, and including noon of October 18th, the scaling was done by Mr. Montgomery or his assistant?

A. Not all the time.

Q. Or an agreed scaler?

A. Or an agreed scaler.

Q. For the last several months of that period it was Mr. Montgomery or his assistant?

A. It was.

Q. At all times you were paid on the basis of that scale? A. I was.

Q. And at no time during the entire history of the contract were the logs ever scaled by Timber, Inc.'s, scaler, or payment made on his scale?

A. Not that I know of. I am sure it was not.

The Referee: Wasn't the scaler a joint scaler?

Mr. Goodwin: Yes, your Honor.

Mr. Hilger: Mr. Montgomery was a joint scaler.

Mr. Goodwin: Yes.

Mr. Hilger: I think you have reference to another scaler, other than the joint scaler.

Mr. Goodwin: As I understood Mr. Vander Jack's earlier [278] testimony, on October 18th a new scaler showed up on the job, brought there by Timber, Inc.; that man refused to give a scale ticket.

Q. Isn't that correct?

A. I believe that is.

(Testimony of Clarence C. Vander Jack.)

Q. Now, Mr. Vander Jack, when did you start logging this area?

A. I believe in April of 1951 we first started operations.

Q. That was in the Redwood Creek area?

A. The Redwood Creek area.

Q. Is that the timber generally known as Merillon or Barnum & Steele timber? A. Yes.

Q. That was the timber you were logging, then, from April, 1951, on through the life of this Timber, Inc., transaction, was it not?

A. That was the timber going to the Timber, Inc., mill.

Q. You started logging there in April of 1951. Do you remember your approximate production during that year?

A. I think on the ranch we put in around twenty-two million feet.

Mr. Hilger: That was 1952?

Mr. Goodwin: 1951.

Q. Now, you logged off twenty-two million feet off that property in 1951?

A. I believe we did.

Q. All those logs were sold in town, were they?

A. They were.

Q. In 1952, what was your total approximate production, as [279] close as you remember?

A. This will be offhand, too, but our records are here. They will vindicate anything.

Q. I recognize that.

(Testimony of Clarence C. Vander Jack.)

A. Possibly thirty-six or thirty-seven million feet.

Q. That is your recollection. I understand you are testifying from memory.

Now, how much of those logs went to Timber, Inc.?

A. Very little. I don't believe over ten million feet in the fiscal year 1952, itself.

Q. (By Mr. Stark): You say "fiscal." You mean the calendar year?

A. The calendar year, that is right.

Q. (By Mr. Goodwin): Twenty-six to twenty-seven million went to town, and ten million, in round figures, to Timber, Inc., in 1952?

A. Something like that.

Q. How about 1953?

Mr. Hilger: Objected to on the ground that the records are the best evidence. They are in evidence, showing the total stumpage delivered to everybody.

Mr. Goodwin: I am just asking for his memory, your Honor.

A. I don't know whether the 1952 records are in there.

Mr. Hilger: These would show for the first eight months of 1953 the deliveries to Timber, Inc., only; they would not show the deliveries to others. I think you could compute it due to the fact that this constituted 40 percent of the entire production.

Q. (By Mr. Goodwin): That is true for [280]

(Testimony of Clarence C. Vander Jack.)

1953? A. That is true.

Q. According to this you delivered 18,181,000 feet the first eight months, which would be through September 30th. That constituted 40 percent of your production? A. Approximately.

Q. So, during that year, you produced about forty-five million feet of logs?

A. It would be somewhere around there.

Q. How about 1954?

A. We ceased logging, I believe, in July, 1954, and were off the ranch. I do not have the figure. It should be in the record some place, though.

Q. It should be in these records here?

Mr. Hilger: In these records here.

Q. (By Mr. Goodwin): You don't have any recollection of what it was in 1954?

A. No, I don't.

Q. All of your 1954 production went to town?

A. All of it.

Q. None to Timber, Inc.? A. No.

Q. You discontinued the logging of this timber in May of 1954?

A. To the best of my recollection.

Q. Now, you testified previously, I believe, Mr. Vander Jack, that there were certain discussions between you and Mr. Peters concerning his building a second mill on the property.

A. There was.

Q. Also some discussion between you and him about cold-decking and a supply of logs for the winter of 1953 and 1954? [281]

(Testimony of Clarence C. Vander Jack.)

A. There was.

Q. Now, it is the fact, is it not, Mr. Vander Jack, that in all those discussions Mr. Peters told you it would depend on obtaining suitable financing?

A. Not the beginning discussions. Toward the end of the discussions, yes.

Q. As a matter of fact, on one occasion you went to Portland with Mr. Peters, trying to render assistance in obtaining financing?

A. I went with him at his request.

Q. For the purpose of arranging financing for the cold deck? A. That is right.

Q. I believe you also testified, having in mind the necessity for an increased volume of logs, in 1953 you purchased substantial additional logging equipment. A. In 1952 and 1953.

Q. Now, did you consult with Mr. Peters about the type and amount of equipment you were going to buy?

Mr. Margolis: Objected to as incompetent, irrelevant and immaterial, whether he consulted with him.

Mr. Goodwin: The evidence introduced by the direct testimony of Mr. Vander Jack was to the effect that he committed himself to this logging program. I think it is only fair to show whether we were consulted about the commitments he made or not.

Mr. Margolis: I withdraw the objection.

The Referee: Very well.

(Testimony of Clarence C. Vander Jack.)

The Witness: State it again, please. [282]

Q. (By Mr. Goodwin): Did you consult with Mr. Peters about the nature and extent of the equipment you were buying, or intended to buy?

A. I did; not the various items of equipment.

Q. You told him you were going to buy additional equipment? A. Yes.

Q. You did not specify what, or how much?

A. He knew it would be considerable. He is familiar with this business. He knows what it takes.

Q. Did you tell him that?

A. Tell him he was familiar?

Q. Tell him the type?

A. Yes, I told him we were buying "Cats."

Q. Did you buy other "Cats"? A. Yes.

Q. You did not give the details?

A. I did not give a detailed list.

The Referee: Did he ask for any?

A. No.

Q. (By Mr. Goodwin): During the years 1952 and 1953, both, you delivered a certain volume of logs produced by you to them? A. I did.

Q. Did you deliver gang logs to them?

A. I did.

Q. Did you continue delivering gang logs to them at all times prior to October, 1953?

A. I did.

Q. During October, 1953, Mr. Peters was in full production of the gang mill?

(Testimony of Clarence C. Vander Jack.)

A. Well, part of the [283] time he was, part of the time he was not. He did not indicate he wanted to cold-deck anything. I had to have some place to put them. I had to sell them somewhere. The condition got that bad suddenly. I did not want to do the hauling of all the gang logs in the woods. I had to get rid of them. Gang logs can also be called stud logs. You can cut them to dimension.

Q. I understand that. As a matter of fact, a gang log and a stud log is a similar log, is it not?

A. To a degree, yes.

Q. Did you have contracts with anybody else to sell them logs during this period of time?

A. You brought that up in the deposition. I looked in my records, and we did have.

Q. As a matter of fact, in September, 1953, you entered into a contract with Western Studs to deliver them 70,000 feet of logs a day, did you not?

A. No, I don't think so. We have the contract here; let's refresh our memory.

Q. You do have the contract here?

A. I think we do.

Mr. Hilger: We did have it. I am trying to find it for counsel.

The Referee: Take a ten-minute recess.

(Recess.)

Q. (By Mr. Goodwin): Mr. Vander Jack, counsel has handed me a document entitled "Memorandum Agreement Between Snow Camp Logging

(Testimony of Clarence C. Vander Jack.)

Company and Western Studs." When was this agreement made, sir? [284]

Mr. Hilger: Objected to as incompetent, irrelevant and immaterial. The agreement to provide a stud mill with logs does not have any relation to this contract.

Mr. Goodwin: Mr. Vander Jack already testified that stud logs and gang logs are similar logs.

Mr. Margolis: He did not say very similar. He said similar, yes. I will stand on the record.

The Referee: Let's see what Mr. Vander Jack said. I think you are both misquoting what he said.

(Answer read by the reporter as follows:

"* * * Gang logs can also be called stud logs. You can cut them to dimension.")

Mr. Margolis: My further objection is that no proper foundation is laid for the pending question. There is no prohibition in the contract, particularly in the light of the testimony just read back to your Honor.

The Referee: What does your contract say?

Mr. Stark: It is undated. He asked what the date of it was.

Mr. Hilger: It is immaterial.

Mr. Stark: He could have contracted himself to the point where he could not fulfill with us.

The Referee: The question is not whether he could or could not. What does your contract say—the original contract between the Respondent and Mr. Vander Jack?

(Testimony of Clarence C. Vander Jack.)

Mr. Hilger: First of all, it has to do with the duties [285] and obligations of the parties as to what one would buy and the other would sell. Then we get into the rights of the supplier to sell elsewhere. Paragraph 3 states (reading):

“That sellers agree to furnish and buyer agrees to purchase all the logs required by buyer in the operation of any or all of his mills in the Redwood Creek ranch area.”

All he is obligated to do is to supply his requirements. Until some foundation is laid that he did not——

Mr. Goodwin: Read the rest of it.

Mr. Hilger: Paragraph 8 (reading):

“Sellers shall have the right to sell logs of any type to other buyers of logs until buyer comes into full production upon that type of log. In the event buyer ceases production upon any type of log, or cuts back on production, sellers shall have the right to sell any of such logs as buyer does not require upon the open market and to other buyers.”

There is nowhere in there a prohibition to prevent this supplier from selling elsewhere.

Mr. Goodwin: Mr. Vander Jack testified in response to a direct question as to whether Mr. Peters came into full production. He said sometimes he was and sometimes he was not. I believe that was his answer.

The Referee: If that be so, it leaves the in-

(Testimony of Clarence C. Vander Jack.)

terpretation of the contract up to the Court, does it not? [286]

Mr. Stark: It creates this situation, if your Honor please: This man must hold himself in readiness to keep us in full production at all times. Thus, he cannot go out and make contracts while obligated to us, depriving himself of the ability to keep us in full production.

The Referee: At this stage of the proceeding is there any showing that up to the time of the breaking off of the deliveries under the conditions as have developed, or been here developed, that Mr. Peters or his company said, "You are not supplying me with all the logs necessary"?

Mr. Goodwin: Your Honor, we are going to go into that. This contract was to run for a period of ten years.

The Referee: I know.

Mr. Goodwin: If this man contracts away his production of the same type of logs we are using, I feel we have a right to show that.

The Referee: Not until you show that that situation has arisen where Mr. Peters or his company made a demand on him and he could not supply them because of that.

Mr. Stark: We cannot show that all at once.

The Referee: I know.

Mr. Goodwin: I will ask the witness the question.

The Referee: Is the other question withdrawn?

Mr. Goodwin: I will withdraw the question.

(Testimony of Clarence C. Vander Jack.)

Q. Mr. Vander Jack, prior to October 21, 1953, did Mr. Peters make demand on you that all your gang logs be delivered to him? [287]

A. He did.

Mr. Stark: Then, I think we are entitled to ask the date of this contract, because this contract, if your Honor please, provides that Snow Camp Logging Company will deliver to Western Studs, beginning the 1st of October, 1953, 70,000 board feet a day.

The Referee: Well, is there any showing that he did not do it?

Mr. Hilger: That was the question I was just going to propound. After demand being made that he supply all gang logs, is there any showing that he did not?

Mr. Goodwin: Yes. The record has a specific question asked Mr. Vander Jack, whether at all times prior to October 21, 1953, he did not continue to deliver gang logs to them. He said yes. That is in the record.

The Referee: I don't think that answers the question.

Mr. Goodwin: What is the quandary in your mind?

The Referee: The quandary is, you have not shown the condition has arisen where you are entitled to an answer to the question asked. The fact that this other contract is in existence, or that he was delivering to them, I think if the Peters mill was not able to take it at that time, I think you

(Testimony of Clarence C. Vander Jack.)

have got to the point where you must show that when demand was made on him to do it, he could not do it.

Mr. Goodwin: The contract specifically requires him to deliver us all gang logs when we come into full production. [288]

Mr. Hilger: We delivered all, or more, gang logs than they could take. On a two-shift production, the pond was full of logs. As long as we were taking care of our specific obligation to supply all his requirements when he demanded it, and the lack of an express prohibition for sale elsewhere, I think the introduction of what he did elsewhere is entirely immaterial.

Mr. Goodwin: If this is not a prohibition, what is it: "Sellers shall have the right to sell logs of any type to other buyers of logs until buyer comes into full production upon that type of log."

The Referee: I still think until you have shown at any time there actually arose a time Mr. Vander Jack was not delivering—was it 70,000 feet?

Mr. Goodwin: This is with somebody else, the 70,000 feet.

The Referee: Whatever it was—until you show that condition has arisen, that Mr. Peters made demand upon him to deliver and he could not deliver, this is incompetent.

Mr. Goodwin: Suppose this——

The Referee: You are going to have to take the whole contract together.

Mr. Goodwin: Correct.

(Testimony of Clarence C. Vander Jack.)

The Referee: You cannot separate it and take the part most favorable to you and most disadvantageous to Mr. Vander Jack, or vice versa; you have to take it all together.

Mr. Goodwin: Suppose the contract we want to introduce in evidence called for Mr. Vander Jack to deliver 100 percent [289] of his production to somebody else, could we introduce it then?

The Referee: I don't think so, until the other condition arose.

Mr. Stark: We have three conditions: First, when we come into full production. We have testimony that we were in full production. Secondly, Mr. Peters' demand that all the logs be delivered to him. Third, we have this contract where Vander Jack has agreed with a complete stranger to deliver it 70,000 board feet of his lumber that Peters was entitled to, daily.

Mr. Hilger: The execution of a contract with someone else, he might breach this contract, has no bearing on it at all. He might have a hundred contracts; he might be going to breach them.

Mr. Stark: That is so specious.

The Referee: I don't think it is. I think that is the fact, unless you can show that the condition existed where Mr. Peters or his company, or a representative for him or his company, asked Mr. Vander Jack to deliver something, and he could not do it, and did not do it. You haven't a breach of your contract.

(Testimony of Clarence C. Vander Jack.)

Mr. Goodwin: May I ask a couple more questions?

Q. Prior to October 21, 1953, Timber, Inc., made a demand on you to deliver all your gang logs to them, did they not? A. They did.

Q. You had made a contract with Western Studs to deliver [290] 70,000 feet to them?

Mr. Hilger: I object to that. The only question would be whether he delivered all the logs Mr. Peters would take.

The Referee: Or could take. I said you have to look at the whole contract together.

Mr. Stark: Surely, Judge.

The Referee: You have to show a breach; that he was not doing that. Maybe he was going to supply that from somewhere else.

Mr. Stark: I don't quite understand that. He agreed with us that he would deliver all his gang type logs, wherever they came from—all of them. Then he goes to work and agrees to deliver 70,000 feet a day to somebody else. So, he could not deliver all he has to us.

Mr. Hilger: This contract limits it to the Redwood Creek ranch area.

Mr. Stark: What?

Mr. Hilger: The Redwood Creek source of Timber, and the mills to be built by him.

Mr. Stark: Let's see if I get you straight. Are you inferring that the gang type logs used for studding came from an area other than he was logging for us?

(Testimony of Clarence C. Vander Jack.)

Mr. Hilger: I make no such assertion.

Mr. Stark: You know that is not so.

Mr. Hilger: I say until you prove to the contrary, there is no relevancy in what you are trying to prove here. [291]

The Referee: I cannot see the relevancy of the question at this time. Later on in the proceeding you may show it, but at this time the objection is sustained so far as the other contract is concerned.

Mr. Stark: The question that created all this argument is the date of a contract with the third party, and the date is not shown.

The Referee: It is incompetent and irrelevant at this time. I am not saying that later you may not go into it.

Mr. Stark: So that I may grasp your Honor's thinking, where does the irrelevancy lie?

The Referee: In that you have not shown that a time and condition began here that he could not have been supplied.

Mr. Stark: What you are saying is this: Although he agreed to deliver all—that means everything—of that type log, until we show we had to have all, that the word “all” does not mean anything?

The Referee: That is exactly what I am saying.

Mr. Stark: For all he would know, we were going to stack them in piles in back of our mill.

The Referee: Well, he has testified to that.

Mr. Hilger: Mr. Vander Jack testified on numerous occasions that he begged Mr. Peters to let him

(Testimony of Clarence C. Vander Jack.)

deliver more logs—"Please put up a cold deck." He says, "I haven't the money. It depends on financing. Let's go to Portland." Mr. Vander Jack goes with him to assist Mr. Peters, because he would dearly love [292] to buy them at the advantageous price he had.

You cannot object that the logs went elsewhere.

Mr. Stark: Don't tell me what we can object to.

Mr. Hilger: Successfully object to it.

The Referee: The objection is sustained.

Q. (By Mr. Goodwin): Mr. Vander Jack, in September and October, 1953—I withdraw that.

Mr. Vander Jack, in July, August, September, and October, 1953, where were you logging?

A. I was logging on the Redwood Creek ranch and the Snow Camp area and Blue Lake Creek.

Q. Between the period October 1, 1953, and July 1, 1954, did you sell any logs to a company known as Western Studs, in Arcata?

Mr. Margolis: Objected to as incompetent, irrelevant and immaterial, and not within the issues of this proceeding.

Mr. Stark: What are the issues?

The Referee: The objection is sustained. It is the same question in another form.

Mr. Margolis: The issues in the proceeding are the contract you attach to your claim before this Court.

Q. (By Mr. Goodwin): Mr. Vander Jack, at no time prior to October 21, 1953, did you deliver all the gang logs timbered by you from the Redwood Creek area to Timber, Inc., did you?

(Testimony of Clarence C. Vander Jack.)

Mr. Margolis: I object to the question on the grounds heretofore urged. [293]

Mr. Stark: Will your Honor listen to the question before you rule?

Mr. Margolis: On the further ground that no foundation has been laid.

Mr. Stark: Foundation for what? He could say whether or not he delivered all his gang logs to us.

Mr. Margolis: It is incompetent, irrelevant and immaterial. The contract does not require it.

Mr. Stark: Oh, yes it does. All means all.

Mr. Hilger: All required is the requirement of Timber, Inc.

Mr. Stark: You forget Section 8.

Mr. Hilger: It says he has a perfect right to sell logs somewhere else. As long as you are not using them, he can sell elsewhere.

Mr. Stark: It says this: "Sellers shall have the right to sell logs of any type to other buyers of logs until buyer comes into full production upon that type of log."

Mr. Hilger: Read the second half of it.

Mr. Stark: Just a second. I will read it all for you. That means until—that is a time when buyer comes into full production. Now, Mr. Vander Jack testified that the mill we had was in full production.

Mr. Hilger: He did not so testify. He said sometimes it was, sometimes it was not.

Mr. Stark: That is good enough for the purpose of that [294] section.

Mr. Hilger: Read the second half of the section.

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: "In the event buyer ceases production upon any type of log, or cuts back on production, sellers shall have the right to sell any of such logs as buyer does not require upon the open market and to other buyers."

Mr. Hilger: That means the minute he cuts back from full production we have the right to go and sell elsewhere. That is proof, isn't it?

Mr. Stark: It says this: "In the event buyer ceases production upon any type of log, or cuts back on production, sellers shall have the right to sell any of such logs as buyer does not require upon the open market and to other buyers."

Now, there is no testimony that at any time did Mr. Peters tell him that he could sell any other logs that were committed to Mr. Peters by virtue of not going into full production, or anything else.

The Referee: Did Mr. Peters ever ask?

Mr. Stark: The witness just testified that Mr. Peters made a demand for all his gang logs.

The Referee: I don't care. Could Mr. Peters handle all his gang logs at that time?

Mr. Stark: Your Honor, let me explain this situation—what our position is: My client went into the Redwood Creek area by reason of this contract that is here, and in reliance upon the ten-year timber supply this contract recited he bought [295] a very expensive sawmill with only one source of timber behind it, the contract with Mr. Vander Jack. Now, by reading the contract as a whole, it was obviously the intention of the parties that when Mr. Peters

(Testimony of Clarence C. Vander Jack.)

came into full production of any particular type log, then Mr. Vander Jack was going to clear his operation into producing all that type log Mr. Vander Jack had in this area for a period of ten years into this sawmill. Now, in the common, ordinary scheme of things, my client, an experienced lumber man, is not going to build a highly expensive sawmill with the possibility that Mr. Vander Jack would go in and put a tremendous amount of equipment in there, and cut all the timber out in one year, simply because the pond was not big enough to hold them. It was the intent that this was for a ten-year period. For Mr. Vander Jack to start delivering as soon as he could see them going in the hole fast, we get the loss. We did not need them all today. We need them over a ten-year period.

The Referee: I still say the objection is good.

Mr. Stark: I do see this feature, if your theory is correct, your Honor, and Mr. Vander Jack is entitled to cut off all the timber available to him in a matter of two years, we would have no timber back of our sawmill. We would be sitting in a blank space with all the timber cut.

Mr. Margolis: There is no showing of that.

The Referee: You have not shown that.

Mr. Stark: You completely beg the question. We have to [296] be assured that there is enough timber back of us contracted for to permit us to amortize our investment over X years.

Mr. Margolis: Where does the contract state that?

(Testimony of Clarence C. Vander Jack.)

Mr. Stark: It says that you are committed to deliver to us for ten years all that type log you cut and have ready for delivery. We are entitled to rely on that.

The Referee: What is your contention, then? Are you contending you were defrauded in your contract?

Mr. Stark: Pardon?

The Referee: Are you contending you were defrauded in your contract?

Mr. Stark: No.

The Referee: Then, to my mind, your argument falls by the board.

Mr. Stark: No; we contend this, if your Honor please: After we come into full production, able to have X number of feet per day, we were entitled to clamp down on Snow Camp Logging Company and say, "You cannot deliver to anybody else our type of log, because we have to have them available to us out of the area we had contracted with you for sufficient logs so we can amortize over a period of ten years our investment. We don't want, because you sold logs to other people because we could not use them at the moment, we don't want to be in the position of having our timber cut out." That is what broke more sawmills in the Northwest than anything else. They have to haul timber so far. [297]

Mr. Hilger: Since Mr. Peters got timber in the last three weeks some place else, that argument does not agree with the facts, and does not agree with the law.

(Testimony of Clarence C. Vander Jack.)

The Referee: We have to stop somewhere. The objection is sustained.

Mr. Goodwin: If your Honor please, with all due respect, in view of the Court's ruling, I would like to make an offer of proof, if I may. The offer is to introduce in evidence a document that reads as follows (reading):

“Memorandum of Agreement

“This is a memorandum of agreement between Snow Camp Logging Company and Western Studs.

“Snow Camp Logging Company agrees to supply and Western Studs agrees to receive one (1) shift of logs per day (approximately 70,000 board feet) beginning October 1, 1953, and continuing until such time as Western Studs begins to cut their cold deck in the early part of 1954, or until July 1, 1954, whichever is earlier.

“It is agreed that the logs will be sealed by Western Studs unless there is a disagreement as to the scale, in which event they will be scaled by the Northern California Scaling & Grading Bureau and each party will bear fifty per cent (50%) of the cost thereof.

“The grade of logs to be delivered will be [298] an average of fifteen per cent (15%) or less deductions over an average two weeks.

“It is agreed that as long as Western Studs is operating and producing lumber and Snow Camp Logging Company is operating and producing logs,

(Testimony of Clarence C. Vander Jack.)

that this agreement will be effective and of first consideration of either party.

“In the event that either party discontinues operation as a result of market or weather conditions, the provisions of this agreement shall be suspended for so long as the operations of either or both parties is suspended.

“The price to be paid for the logs f.o.b. pond of Western Studs in Arcata, will be a price in relation to the market price of 10/15% No. 3 Btr studs as in the attached addenda.

“The market price of studs shall be determined by the price quoted for 10/15% No. 3 & Btr studs in the ‘Random Lengths’ as published weekly by Lumbermen’s Buying Service in Eugene, Oregon, or by mutual agreement.

“Dated:

“WESTERN STUDS,

“By F. H. BAKER.

“SNOW CAMP LOGGING
COMPANY,

“By CLARENCE C. VANDER
JACK,

“Ptr.” [299]

And attached to the document is an addenda.

Mr. Hilger: We will stipulate the reporter can copy that without reading it.

Mr. Goodwin: Fine.

(Testimony of Clarence C. Vander Jack.)

(The addenda to the above agreement, in words and figures is as follows, to wit:

"Market Price
10/15% No. 3 & Btr
Studs F.O.B.
cars

Price of 15% or less
Deduction logs
F.O.B. Pond of
Western Studs, Arcata

\$40.00	\$25.00
41.00	25.50
42.00	26.00
43.00	26.50
44.00	27.00
45.00	27.50
46.00	28.00
47.00	28.50
48.00	29.00
49.00	29.50
50.00	30.00
51.00	31.00
52.00	32.00
53.00	33.00
54.00	34.00
55.00	35.00
56.00	36.00
57.00	37.00
58.00	38.00
59.00	39.00
60.00	40.00
61.00	40.50
62.00	41.00
63.00	41.50
64.00	42.00
65.00	42.50

(Testimony of Clarence C. Vander Jack.)

"Market Price
10/15% No. 3 & Btr
Studs F.O.B.
cars

Price of 15% or less
Deduction logs
F.O.B. Pond of
Western Studs, Arcata

66.00	43.00
67.00	43.50
68.00	44.00
69.00	44.50
70.00	45.00
71.00	45.50
72.00	46.00
73.00	46.50

C. C. V. J.,
F. H. B.")

Mr. Goodwin: We make an offer to prove such an agreement was executed by Snow Camp Logging Company in about the fall of 1953.

The Referee: Very well. The offer will be denied, and I will mark this as Claimant's A for identification.

(The Memorandum of Agreement and Addenda referred to was marked Claimant's Exhibit A for identification.) [301]

Mr. Goodwin: Along the same line, your Honor, I would like to further offer to prove—that is, to prove by the testimony of this witness, Mr. Vander Jack—that between the period from October 1, 1953, to July 1, 1954, Mr. Vander Jack, or Snow Camp Logging Company, did deliver, from the timber that is involved in this matter, to Western Studs, near Arcata, California, at least 70,000 feet a day of logs.

(Testimony of Clarence C. Vander Jack.)

The Referee: The offer will be denied. You have it in the record.

Mr. Goodwin: Thank you, your Honor.

Q. Mr. Vander Jack, at the time you commenced logging this timber in 1951, what, in your opinion, was the total volume of timber on the ranch?

A. Approximately two hundred fifty to three hundred million feet of timber.

The Referee: What?

A. Two hundred fifty to three hundred million feet of timber.

Mr. Stark: Did you have a scale?

Mr. Hilger: He asked for an estimate, and he gave one.

The Referee: His opinion is what he asked for.

Q. (By Mr. Goodwin): Was that two hundred fifty million?

A. Between two hundred fifty million and three hundred million.

Q. At the time you discontinued operations on that ranch you had logged approximately half of the timber?

A. I don't think we had. I don't recall. We logged around one hundred million feet of it, I believe, about. [302]

Q. That was from 1951 to 1954?

A. Right around that figure.

Q. I believe you previously testified, from your best recollection, that you logged twenty-two million feet in 1951, thirty-six million feet in 1952,

(Testimony of Clarence C. Vander Jack.)

and forty-five million feet in 1953, which I think is one hundred three million, plus your 1954 logging?

A. Is that correct? Did you add that up?

Mr. Goodwin: That is what I get.

Mr. Stark: One hundred three million.

Q. (By Mr. Goodwin): Plus what you logged in 1954? A. That is right.

Q. Do we have in evidence the 1954 logging?

A. The Bankruptcy Court would have that record, if it is available.

Mr. Stark: You did not go into bankruptcy until 1955, did you?

A. They took all my records.

Q. You haven't the 1954?

Mr. Hilger: We did not bring them.

Mr. Stark: Are you willing to estimate it?

Mr. Hilger: Yes. He had that, and other operations going, too.

The Witness: Those figures are not all off that ranch; different areas.

Q. (By Mr. Goodwin): These figures are not all off that ranch? A. No. [303]

Q. How much did you log off that ranch in 1951?

A. In 1951 I think about half of the production came out of there and half out of Snow Camp.

Q. That would be eleven million feet from the ranch? A. That is approximately.

Q. How much did you log off that ranch in 1952?

(Testimony of Clarence C. Vander Jack.)

A. I wish I had something to go by here, because we logged in so many different areas.

The Referee: Has the Bankruptcy trustee the records?

The Witness: They have, yes.

Mr. Hilger: I think I can put 1952 together, having gone through that file. I have some records for 1954.

The Referee: I will ask you this question: Technically, would 1954 enter into it at all, unless you can first show there was an actual breach on the part of the Vander Jacks?

Mr. Margolis: That was the basis of the other objection.

Mr. Hilger: The 1954 production would be just informative. It would prove nothing, our contention being that his obligation to continue to deliver to Mr. Peters was discharged on October 21, 1953. So, what he did in 1954, under that theory, would be immaterial.

The Referee: I think at this stage of the proceeding it would be immaterial. I don't say that it would be later on.

Mr. Hilger: At any rate, I will attempt to get together the information for you.

Mr. Goodwin: I will appreciate that and accept that for [304] the time being.

Mr. Margolis: May I ask a question, your Honor?

Q. The forty-five million figure given by counsel, was that all from this particular source for the year

(Testimony of Clarence C. Vander Jack.)

1953? A. No, it was not.

Q. From other sources, the total production?

A. The total production.

Q. Approximately forty-five million?

A. Somewhere around that.

Q. (By Mr. Goodwin): Do you remember how much came off that ranch?

A. I would say two-thirds of it.

Q. Thirty mililon feet off that ranch?

A. I would think so.

Q. Of which eighteen million feet went to Timber, Inc.?

A. Approximately. You computed that yourself one time, I think.

Mr. Hilger: The first eight months; that is correct, that is the right figure.

Q. (By Mr. Goodwin): Mr. Vander Jack, you testified, I believe, that you, on several occasions, complained directly to Mr. Peters about the log dump being plugged.

A. I testified I did, yes.

Q. Now, did Mr. Peters tell you on those occasions that the reason the dump became plugged occasionally was because you were bunching your trucks up? A. He did not.

Q. As a matter of fact, your trucks usually went down town in [305] the morning, did they?

A. No.

Q. They never did?

A. No. Depending on the logs they had.

(Testimony of Clarence C. Vander Jack.)

Q. Would you say the deliveries to the Peters mill were of gradual spacing?

A. It depended on the area we were logging. If we were logging where there were more logs, he would get more trucks. If we were logging in another area, he would not.

Q. Didn't the plugging occur when a large number of trucks were delivering logs there?

A. During the summer a large number of trucks were delivering, because that is our big production.

Q. Any difference between, say, morning and afternoon?

A. I don't think any relative amount of difference at all.

Q. Well, the log dump was open every morning, was it not? A. No, it was not.

Q. Well, the log dump was open every morning except on one occasion, was it not?

A. No, that is not so.

Q. Is it not a fact that the pond men at night moved a series of logs bound together from one side of the dump to the other side, and had open water every morning?

Mr. Margolis: Objected to on the ground that no proper foundation has been laid.

The Referee: Would he know that, how they did it at night?

Mr. Stark: If he does not know, he can say he does not know. [306]

Q. (By Mr. Goodwin): **If you know.**

The Witness: Would you restate the question?

(Testimony of Clarence C. Vander Jack.)

Q. (By Mr. Goodwin): Do you know whether or not the pond crew moved the bound logs, whatever you call them, jammed together in the water, from one side of the dump to the other, so they always had open water to dump in in the morning?

Q. I cannot answer what they did. I can answer there was not always open water in the morning.

Q. On how many occasions, to your own knowledge?

A. To my own knowledge I would say ten, at least.

Q. When the dump would be plugged in the morning? A. At least that many.

Q. During when, in the logging season?

A. The summer months and early fall.

Q. Of 1953? A. Yes.

Q. Now, of course, the dump being plugged had no effect on your town deliveries, did it?

A. A definite effect.

Q. What effect?

A. It would tie up my trucks with logs on them, and they would not be effective if I could not use them.

Q. What I mean to say, Mr. Vander Jack—I see your answer, which I think perhaps is correct—I mean to say a truck that was loaded with logs for delivery to town would not be affected by a plugging of the dump? A. It would not be.

Q. Did you have a dispatcher, some individual that directed the destination point of the various loads of logs? [307] A. We did.

(Testimony of Clarence C. Vander Jack.)

Q. Who was that? A. Charley Heckard.

Q. He was your truck boss? A. He was.

Q. Part of his duty was to instruct the truck driver where he was to go?

A. That is right.

Q. Your setup at that time had two-way radio equipment, did it not?

A. We had it in some of the pickups.

Q. Did Heckard have it? A. He did.

Q. Did you have means of communicating with the sawmill or dump with that equipment?

A. No, we did not.

Q. You had no station there? A. No.

Q. So, you could communicate with the sawmill if you had a truck with that equipment?

A. If we had them.

Q. You used that method of communicating?

A. At times. I had one in my pickup. The road boss had one in his.

Q. I did not understand.

A. I had a two-way set—actually, a radiophone. There were four trucks, I believe, equipped with them—yes, I think four; four pickups—myself, and the truck boss, and the road boss, and I had one also in the woods, for fire.

Q. Generally, then, you had a method of determining what the situation was from time to time at the log dump? A. We did, yes.

Q. And your dispatcher, then, could dispatch trucks accordingly? A. He could. [308]

Q. Mr. Vander Jack, Merle Montgomery was a

(Testimony of Clarence C. Vander Jack.)

scaler for the Humboldt Bay Log Scaling Bureau, was he not? A. He was.

Q. Did you have any financial interest in the Humboldt Bay Log Scaling Bureau?

A. None whatsoever.

Q. At no time? A. At no time.

Q. Did Snow Camp Logging Company, the corporation, have an interest in that bureau?

A. None.

Q. Did you, individually? A. None.

Q. Did your father? A. None.

Q. Did any of your partners in Snow Camp?

A. No.

Q. I believe you testified it was on October 18th at the sawmill that you saw some trucks there from Wheeler Logging Company.

A. They were carrying Wheeler logs, I know that. Wheeler was contracting for Ike Koontz. I think Wheeler owned some of the trucks; some were gyppo trucks. They were not our logs. They were logs of Koontz. Wheeler was the contractor for Ike Koontz, as I understand.

Mr. Stark: I believe it is obvious that we cannot finish today. It is four o'clock, and I am sympathetic with Mrs. Blair and myself.

Mr. Margolis: How about us?

Mr. Stark: Yes.

Mr. Margolis: And the Court.

Mr. Stark: Yes.

The Referee: The Court never gets tired when a case is [309] well tried.

(Testimony of Clarence C. Vander Jack.)

Mr. Goodwin: That is very kind.

The Referee: That is the fact. I think everybody trying this case is trying it as it should be tried. If you sat here and saw cases butchered as much as I do, you would know how much I appreciate it.

January 21st. I can give you three days. It is continued to January 21st at 10:00 a.m.

Mr. Stark: 21, 22, and 23?

The Referee: Yes. You are looking out for Mr. Vander Jack?

Mr. Margolis: We are, yes.

Mr. Stark: Incidentally, will you instruct Mr. Vander Jack to return on that date?

Mr. Margolis: He will be here.

The Referee: He will be here. You just see that he is compensated as we made the order.

Mr. Margolis: We will take care of that pursuant to your Honor's prior order.

(Adjourned to Monday, January 21, 1957,
at 10:00 a.m.) [310]

Monday, January 21, 1957—10:00 A.M.

Same appearances.

The Referee: You may proceed in Snow Camp Logging.

Mr. Goodwin: I believe Mr. Vander Jack was on the stand when we discontinued the last time.

The Referee: Take the stand, Mr. Vander Jack.

CLARENCE C. VANDER JACK
(Recalled)

having been sworn previously,

Cross-Examination
(Resumed)

By Mr. Goodwin:

Q. Mr. Vander Jack, I believe your testimony was that you discontinued delivering logs to the Peters mill about October 21, 1953?

A. I think that is right.

Q. I believe you also testified that you had a conversation with Mr. Green, the mill manager, stating that he said he would only pay \$28.00 for the logs, and would not value the logs on Montgomery's scale.

A. That is right.

Q. After that time did you discuss the matter with Mr. Peters?

A. I did, over the phone. Mr. Peters substantiated that statement.

Q. Do you know when that was?

A. That would be approximately October 18th or 19th.

Q. It was the last two or three days of the operation?

A. That is correct. [311]

Q. Now, after that time did you have any correspondence with Mr. Peters about his taking or refusing logs?

A. I don't recall. I don't think that we did.

Q. Through your attorney and Mr. Peters' attorney there was certain correspondence?

A. There was.

(Testimony of Clarence C. Vander Jack.)

Q. Exchanged, relating to the problem. Did I understand you to say also that on this last day, or approximately the last day of the operation, that you had sent Mr. Virgil Ray in to deliver logs and try to get a scale ticket?

A. You did, yes.

Q. You asked him to go in and try to get a scale ticket from the Timber, Inc., scaler?

A. Right.

Q. He reported back to you that he had been refused?

A. He reported back that he had been refused.

Q. Mr. Vander Jack, I show you what purports to be a copy of a letter addressed to Mathews & Traverse, designating a copy thereon to you, dated November 18, 1953. Do you recall receiving that letter? A. I do.

Mr. Goodwin: You recall receiving a copy of that.

I would like to offer the letter in evidence.

Mr. Hilger: Objected to as hearsay, and it is a self-serving statement.

The Referee: Let me see it.

Mr. Goodwin: There are certain self-serving declarations in the letter. I am interested in offering it for the purposes of the third paragraph in the letter. [312]

Mr. Hilger: That is the part that is particularly self-serving.

Mr. Goodwin: It is not self-serving. It is an offer to receive the logs.

(Testimony of Clarence C. Vander Jack.)

Mr. Hilger: It is not an offer to receive logs under any terms and conditions. It merely says they offer to receive logs. It does not say at what price or in what manner they are to be paid for, or under what contract or agreement.

Mr. Stark: Your Honor, may I observe, if that is what it says, that is what it says.

Mr. Hilger: It is a self-serving statement. They bind themselves to do nothing by it. It cannot be an offer unless they offer to do something.

Mr. Goodwin: Mr. Hilger overlooks the fact of the contract between the parties.

Mr. Hilger: Which had been repudiated. That is our contention. If he wants to repudiate that, he should call someone to do so under oath on the stand.

Mr. Goodwin: The testimony by Mr. Vander Jack is that we did refuse to accept his logs. The purpose of the offer of this letter is to show that we were at all times willing to receive logs from Mr. Vander Jack, which is one of the points in this entire dispute.

The Referee: What is your contention, Mr. Hilger?

Mr. Hilger: My contention, your Honor, is that it is a self-serving statement; it does not show any terms or conditions [313] upon which these logs are offered to be received. The behavior of Mr. Peters at that time was that he consistently was receiving logs from other suppliers in violation of the contract. According to the testimony in the record he

(Testimony of Clarence C. Vander Jack.)

was refusing to pay anything close to the contract price. An offer to accept logs without reference to the terms under which he would accept them is nothing but a self-serving declaration. It would not have bound him had Mr. Vander Jack delivered logs. It would not bind him to accept the logs at the contract price. Mr. Peters refused to pay anything more than \$28.00. That is the testimony before the Court at the present time. This is a self-serving statement. If it is considered that it would not bind Mr. Peters or Timber, Inc., to do anything, it can be nothing but self-serving.

Mr. Goodwin: It is direct rebuttal, your Honor, of testimony introduced by this witness that Timber, Inc., were unwilling and refused to accept any logs; direct rebuttal of that point.

Mr. Hilger: By a self-serving declaration.

Mr. Goodwin: I don't care if it is a self-serving declaration. Assuming it is, which it is not, assuming it is, it would be properly admissible for the rebuttal of the testimony of this witness.

Mr. Hilger: The proper way to rebut it would be for someone to put himself under oath and declare the terms, conditions, and at what price they would accept logs, rather than by such a self-serving declaration as this. It is pure hearsay. [314]

Mr. Stark: I don't know what counsel means by a self-serving declaration. It is simply a communication between the litigants prior to the time

(Testimony of Clarence C. Vander Jack.)

the litigation arose, wherein we offered to accept the logs that he was willing to deliver, period.

The Referee: It goes further than that—"to accept such logs as is required by the contract." What about that statement, Mr. Hilger?

Mr. Hilger: Well, it does not state the terms and conditions under which they are to be accepted.

Mr. Goodwin: The contract does.

Mr. Hilger: In other words, trying to prove by a statement that which they were unwilling to do by his actions; offering to state he would receive logs, but when they were delivered he does not take them.

The Referee: It says "willing and able to accept such logs as is required by the contract."

Mr. Stark: The contract sets the price.

Mr. Hilger: He had already repudiated the contract by his behavior.

The Referee: Isn't that a matter for the Court to determine?

Mr. Hilger: That is exactly true.

The Referee: Can you say it is repudiated until the Court has acted on it?

Mr. Hilger: Our contention, of course, is that it has [315] been repudiated, and we offered certain evidence in that respect. Now they seek to rebut it, which they have the right to do by proper testimony under oath.

The Referee: I think the language "willing and able to accept such logs as is required by the con-

(Testimony of Clarence C. Vander Jack.)

tract to be delivered" offsets your saying there are no terms upon which the offer is made.

Mr. Stark: I haven't known an instance where you could not rebut direct testimony on cross-examination by showing the opposite contained in a written document, which he admits receiving.

Mr. Hilger: Well, it is counsel's position that you can write a letter saying: "Your position is wrong, sir," and by thus doing, prove it?

Mr. Stark: We don't say that in the letter. We say according to the contract the party is willing to receive your logs.

Mr. Hilger: It does not say "according to the contract."

The Referee: ——"as is required by the contract." Doesn't that mean according to the contract?

The objection is overruled.

Mr. Goodwin: Thank you, your Honor.

I ask the Court's permission, if I can, to read that third paragraph.

Mr. Stark: I think you will be interested if you will let him read just that paragraph. [316]

The Referee: I will let him do that, but I want to mark it claimant's No. 2.

(Letter dated November 18, 1953, addressed to Mathews & Traverse, was admitted in evidence as Claimant's Exhibit No. 2.)

Mr. Goodwin: Reading the third paragraph of the letter dated November 18, 1953, which is

(Testimony of Clarence C. Vander Jack.)

marked Claimant's Exhibit No. 2, it reads as follows:

"With reference to proffered logs being refused, I have discussed this matter extensively with Mr. S. A. Peters, who states that there is no merit in this contention whatsoever. Mr. Peters says that his organization is and at all times has been ready, willing and able to accept such logs as is required by the contract to be delivered, but that none have been offered since October 21, 1953."

Q. Mr. Vander Jack, during the summer and fall logging season of 1953 you delivered logs to various mills around the Arcata area, did you not? A. We did.

Q. Do you remember who some of those were?

A. There was McIntosh; some to Precision; some to Thrasher; Western Studs; Phil Hanley; various plywood mills.

Q. Now, where were those logs scaled?

A. They were scaled through Montgomery.

Q. Would that be up at the Peters sawmill?

A. That is correct.

Q. They were scaled there. Now, I believe in your previous [317] testimony you stated your records reflected that the deduct was less on the logs going to Timber, Inc., than to these other mills. Is that correct? A. That is right.

Q. And I believe Mr. Hilger asked you what the significance of the comparison of the percentage of deduct was. You said it would indicate that Mr. Peters would get a more thrifty type log with less defect. A. That is correct.

(Testimony of Clarence C. Vander Jack.)

Q. It could also mean that Mr. Peters' logs were being over-scaled?

A. No, it could not.

Q. Why not?

A. Because Mr. Peters was getting a smaller type log. A gang-type log is a younger type log, less subject to disease and defect. You do know that.

Q. Well, if the scaler was tighter on his deduct with Timber, Inc., than he was on other logs, it would produce exactly the same result?

A. No, it would not. I did explain to you. I will go over it again. The smaller the type log, the younger the log is, the less defect it has. The younger the tree, the less chance it has for disease to attack it before old age sets in. Therefore, the younger the log, the less defect there will be in it. That is a standard rule, a standard proverb; more than a proverb, it is so.

Q. That would still be so if on the small logs they were all over-graded or sorted, would it not? You can take and find small logs with defects in them?

A. You can find a few defects in small logs.

Q. It would be theoretically possible at the landing to sort [318] logs with little or no defect into one area, and logs with defects into another area? That would be possible?

A. It is a possibility, but that was not the case.

Q. I did not say that was the case. It could have existed? A. It could.

Q. In that case, if you take the logs that do

(Testimony of Clarence C. Vander Jack.)

have defects, those figures could also show they were being over-scaled, would they not?

A. No. The scaler would have to take that into account.

Q. He should take it into account?

A. Yes.

Q. If, in that respect, for one reason or another he did not, the figure could indicate the logs were being over-scaled?

Mr. Margolis: Objected to as argumentative.

Q. (By Mr. Goodwin): Is that right?

The Referee: I think it is argumentative.

Q. (By Mr. Goodwin): Now, Mr. Vander Jack, according to your previous testimony, the deduct for Thrasher was 12.1 per cent during, I believe, this was the first half of September, 1953, some particular time; and 4.5 per cent for Timber, Inc. That was your testimony from the records, I believe.

A. That is probably so.

Q. Now, the type of logs going to Thrasher and the type of logs going to Timber, Inc., were similar logs, small logs?

A. No, they were not. Peters got a smaller type log; Thrasher got a bigger log.

Q. Wasn't Thrasher a stud mill?

A. That is right. [319]

Q. Aren't a stud log and a gang log very similar?

A. They can be at times. However, Thrasher cut a much bigger log. Mr. Peters did not want to cut anything over 32 inches. I guess he could have cut 35 or 36.

(Testimony of Clarence C. Vander Jack.)

Q. How big was Thrasher's?

A. He had a 60-inch opening.

Q. How about Western Studs?

A. The same would be true.

Mr. Goodwin: I don't have any further questions.

Redirect Examination

By Mr. Hilger:

Q. Mr. Vander Jack, the price of the logs that you delivered to Mr. Peters during this period in 1953 we have been testifying about was computed according to a contract which is in evidence?

A. That is right.

Q. That provided a method or basis for the computation at that price?

A. That is correct.

Q. Now, there has been introduced into evidence the invoices of Snow Camp Logging Company delivered to Timber, Inc., covering the log deliveries from August 1, 1953, through October 15, 1953. I show you photostats of those exhibits to which you testified. The invoice, as it left your office, would be revealed by the typewritten figure?

A. That is right.

Q. And the pencil figures had been placed thereon after it left your office?

A. That is right.

Q. And you heard Mr. Peters' testimony that those pencil figures were the ones inserted by his office? [320]

(Testimony of Clarence C. Vander Jack.)

A. That is right.

Q. Now, referring to the very top of the invoice, you have: "Footage; 42 per M; 42 feet, \$1.00 per M," and the total. What are those figures?

A. The \$42.00 is the price we received for the logs; 42 feet is the length; \$1.00 M is the premium price for longer logs.

Q. Then at the bottom it says: "Less \$4.00 per M." What does that signify?

A. That signifies the price to Mr. Peters under the contract.

Q. This \$42.00 per thousand, and \$1.00 premium for logs over 42 feet, would be the Arcata price, is that right? A. That is right.

Q. In all the invoices covering this period, introduced into evidence, those figures at the top tabulation would represent the Arcata market price at that time? A. They would.

Q. You had been delivering logs to Timber, Inc., and the Peters mill for some time prior to this period, had you not? A. I had.

Q. And all those deliveries were under this contract that is in evidence? A. That is right.

Q. Had, during that time, any procedure been used consistently for the determination of the Arcata market price?

A. Well, we sold to as many as six or seven mills other than Mr. Peters in that area, and they were the major mills there—probably constituted 75 to 90 per cent of the mills. That was a fair stand-

(Testimony of Clarence C. Vander Jack.)

ard for the market, I am sure, and that was always [321] acceptable to Mr. Peters.

Q. And that procedure had been used during the entire performance of the contract?

A. That is correct.

Q. The same procedure establishing the market per the invoices you submitted?

A. That is right.

Q. There was no objection ever conveyed to you that this was not the proper method to use?

A. No, there never was.

Q. To compute the price under the contract?

A. No.

Q. In other words, there was no dispute about that? A. No dispute about it at all.

Mr. Stark: You mean no dispute about the method of computation. Is that what you mean, counsel?

Mr. Hilger: That is correct. I have asked him about his method of computation, and whether or not that was proper, and he said no objection was made that it was not the proper method.

Q. Payments had been made to you pursuant to that method, and the deliveries reflected under these invoices that are in evidence?

A. That is right.

Q. There were no objections whatsoever?

A. No.

Q. Now then, about the production at the Peters mill: During the summer of 1953, do you know

(Testimony of Clarence C. Vander Jack.)

anything about the amount of production and the number of shifts being worked during that period?

A. Commencing——

Mr. Goodwin: If your Honor please, we object to this as not proper redirect. It was not covered in the scope of the [322] cross-examination in any shape, manner or form, that I recall.

Mr. Hilger: I think perhaps it was touched upon, your Honor.

Mr. Goodwin: I would like to see it, Mr. Hilger.

Mr. Hilger: There is interrogation regarding the request or demand of the Peters mill with the statement that they were in full production. We argued at some length the provisions of the contract, whether or not being in full production Peters would have the right to have all the gang logs reserved to him, and the question of full production has definitely arisen. It was along the latter part of the proceeding.

Mr. Goodwin: Your Honor, this witness testified previously that Peters made a demand for all his gang logs. The question was asked whether Peters was in full production. His answer was, as I recall, they were more or less in full production—as I recall.

Mr. Hilger: If that is it, counsel has answered his own question. It was touched on in cross-examination. I would like to go into it at this time.

The Referee: What about that, counsel?

Mr. Goodwin: I don't remember whether it was

(Testimony of Clarence C. Vander Jack.)

on cross or direct, but I think I can find it in a minute.

The Referee: Use the Al Smith method. Look at the record. I have a vague recollection of it.

Mr. Stark: It was in response to a question of my associate. He made the statement that he was more or less in [323] full production.

Mr. Goodwin: If that is the case, I withdraw the objection.

The Referee: Very well.

Read the question.

(Question read by the reporter as follows:

“Now then, about the production at the Peters mill: During the summer of 1953, do you know anything about the amount of production and the number of shifts being worked during that period?”)

A. I do.

Mr. Margolis: It is at page 286.

Mr. Hilger: All right.

What is the question, again?

The Witness: I have got the question. I do know about his production. He run production of three shifts up until August—possibly part of it; then cut back to two shifts. Then, when he changed managers, the production fell down off the two shifts quite a bit, and our deliveries of logs started to fall down about the same time, to Mr. Peters. He may have even cut back to one for all I know.

(Testimony of Clarence C. Vander Jack.)

I know he did cut back to two sometime during August, until we discontinued delivering logs.

Q. (By Mr. Hilger): And during the month of September he was not operating at three shifts?

A. No, he was not.

Q. He had been previously? A. Yes.

Q. That is September of 1953?

A. That is right. [324]

Q. Now, at all times during September and October did you keep Mr. Peters' pond full of logs?

A. We did, as many logs as he could take and would take.

Q. You had his pond full at all times?

A. We did.

Q. And your records reveal fewer deliveries of logs during September and October than for the previous months? A. They do.

Q. Did he ever resume a three-shift operation after he ceased in August—that is, before October 21, 1953? A. No.

Mr. Hilger: That is all.

The Referee: Mr. Vander Jack, do you know whether or not there was any response made to this letter of November 18, 1953?

A. I don't know. It would have to be in the attorneys' files or our file. I don't recall a letter. I assume there probably was. Mr. Goodwin might know that.

The Referee: Do you know, Mr. Goodwin?

Mr. Goodwin: Your Honor, to the best of my knowledge the answer is no, there was no response.

(Testimony of Clarence C. Vander Jack.)

Mr. Hilger: That letter there was written in answer to a letter dated November 11, 1953, to which it makes direct reference. I believe that letter was transmitted to the office of Huber and Goodwin, who did the composition of the letter there. We intend to offer that letter in evidence. If you received the original of the letter dated November 11, 1953, we would like to introduce it in evidence, inasmuch as an exhibit which is in evidence refers to it directly. [325]

Mr. Goodwin: I have it in my file.

Mr. Hilger: I have a copy of it. Probably we can lay a foundation for its acceptance and just introduce it.

I offer the letter dated November 11, 1953, from the office of Mathews & Traverse, addressed to Huber & Goodwin.

The Referee: Trustee's No. 19.

(Letter dated November 11, 1953, from Mathews & Traverse to Huber & Goodwin was admitted in evidence as Trustee's Exhibit No. 19.)

Recross-Examination

By Mr. Goodwin:

Q. Mr. Vander Jack, it was during the summer of 1953 that a disagreement arose between you and Mr. Peters as to what the Arcata market price was, is that correct?

A. That is not quite correct. There was no disagreement on our part as to what the price was.

(Testimony of Clarence C. Vander Jack.)

Q. On your part? A. That is right.

Q. Mr. Peters did not agree with your version of it? A. Apparently not.

Q. Prior to that time there had been no particular disagreement as to the Arcata market price?

A. There had not.

Q. But starting in July or thereabouts, Mr. Peters' version of the Arcata price was not your own? A. Apparently not.

Q. When did they start operation?

A. I believe May, 1952.

Q. How many shifts a day were operated?

A. At the [326] start, as I recall, probably one shift.

Q. Subsequently two shifts?

A. And then to three.

Q. When did it go to three shifts?

A. I think probably around in May of 1953, and I think they tried it once or twice before that.

Q. How long did they run on three shifts altogether? A. I could not tell you exactly.

Q. What effect did running on three shifts have on the mill production?

A. I would not know.

Mr. Goodwin: That is all.

The Referee: Is that all? May Mr. Vander Jack be excused?

Mr. Margolis: Yes, your Honor.

The Referee: Has his fare been taken care of?

Mr. Margolis: Everything is taken care of. He

has agreed to stay on. We may need him for rebuttal.

The Referee: Very well.

(Witness excused.)

The Referee: Anything further?

Mr. Hilger: We will offer to read into evidence at this time the deposition of Walter Friesen taken pursuant to notice on the 17th of January, 1957. I have the original of said deposition.

The Referee: Proceed.

DEPOSITION OF WALTER FRIESEN

“Direct Examination

“By Mr. Hilger: [327]

“Q. You are Walter Friesen? A. Yes.

“Q. You have previously given a deposition in this matter, have you not?

“A. Yes, I assume it's the same one that we met on before.

“Q. The Snow Camp case? A. Yes.

“Q. During 1953 or a portion thereof you were the accountant for S. A. Peters and Timber Incorporated? A. Yes.

“Q. When did you leave that employment?

“A. Around the 9th or 10th of September.

“Q. Of 1953? A. Yes.

“Q. Now do you recall the first—in the early part of August of 1953, how many shifts the Peters mill was operating?

(Deposition of Walter Friesen.)

"A. Timber Incorporated at Redwood Creek was operating three shifts.

"Q. And did they continue to operate those three shifts all the time? A. No.

"Q. What did they change to?

"A. They dropped back, they dropped one shift off their regular schedule and worked on a two-shift basis.

"Q. How long did that continue?

"A. Until I had—until I left and I don't know thereafter.

"Q. They didn't go back to three before you left? A. No.

"Q. Now in the period after they got back to—cut [328] back to two shifts in early August and up to the time you left in September of '53, was there any interruption in the production there at the Timber Incorporated mill?

"A. Yes, there was.

"Q. What was that?

"A. They had several lay-offs in which a number of employees were laid off and it curtailed their production, curtailed their shifts.

"Q. And when was that in effect?

"A. It was the early part of September. It was about ten days before I left.

"Q. And how long did that continue, do you know, or have you any idea?

"A. Well, it was not remedied at the time I left.

"Q. On September 9th or 10th it was still——

"A. (Interrupting): That's right.

(Deposition of Walter Friesen.)

“Q. (Continuing): —in effect?

“A. Yes.

“Mr. Hilger: That’s all.

“Cross-Examination

“By Mr. Goodwin:

“Q. Mr. Friesen, how long did the mill work on a three-shift basis?

“A. Oh, through the early part of the summer, from the spring into the early part of the summer, as I recall.

“Q. Started in the spring of 1953? [329]

“A. As I recall.

“Q. Through the spring and summer they ran three shifts? A. Yes.

“Q. Prior to that time they operated on a two-shift basis, is that correct? A. Yes.

“Q. Subsequent to that time they operated on a two-shift basis? A. Yes.

“Q. As far as you know that’s the only time they did run three shifts?

“A. As far as I know.

“Q. With reference to this curtailing production that you spoke of, when did that occur?

“A. It occurred near the first part of September.

“Q. And of 1953? A. 1953.

“Q. So from the period of September the 1st, 1953, until September the 10th, 1953, the mill was not operating?

(Deposition of Walter Friesen.)

“A. It was operating but on a limited basis.

“Q. How many shifts a day?

“A. I think two shifts but their production was down.

“Q. How do you know that, Mr. Friesen, that their production was down?

“A. I could only refer to the records which I kept.

“Q. Well, your payroll records wouldn't show anything about production?

“A. We kept them on a cost basis in showing the production.

“Q. Do you mean to tell me that there was a daily [330] lumber tally taken of the production of that mill in September of 1953? A. Yes.

“Q. You're quite sure of that? A. Yes.

“Q. You kept them yourself?

“A. I didn't keep them, but I had truck tickets turned in to me which showed the actual tally off the green chain.

“Q. So that in the period of September 1st through September 10th, 1953, there was a green chain tally? A. Yes.

“Q. And that showed the lumber production of the mill each day during that period?

“A. Yes.

“Q. And you're quite sure of that?

“A. Yes.

“Q. And these records that you refer to showed that there was a decline in the mill production?

“A. I would say so.

(Deposition of Walter Friesen.)

“Q. What was the decline in figures?

“A. Well, I don’t remember right offhand.

“Q. Well——

“A. (Interrupting): I would have to refer to the records.

“Q. Well, what was the production of the mill prior to September the 1st, 1953, per shift?

“A. Now that’s an eight-hour shift you are referring to?

“Q. Yes.

“A. Somewheres in the neighborhood of eighty to eighty-five thousand.

“Q. All right. What was it during this ten-day [331] period?

“A. Well, I just don’t remember.

“Q. Do you have any recollection at all? Would it be seventy-five thousand?

“A. Well, I wish I had the records. I could show them to you, but I don’t have them.

“Q. You have no independent recollection?

“A. Well, I could make an independent guess.

“Q. What would be your best recollection?

“A. I would say it would be about sixty-five to seventy, something like that. There was a complete change of management.

“Q. So before September 1st you’d say that the production was eighty to eighty-five thousand board feet per shift, is that what you said?

“A. Approximately, uh huh.

“Q. And during this ten-day period it would drop to perhaps sixty-five? A. Right.

(Deposition of Walter Friesen.)

“Q. According to your best recollection?

“A. Yes.

“Q. Do you know the reason for the reduction in the—for the reduced production?

“A. It was a change of method of operation and a reduction of employees on the operation itself.

“Q. What was the change in the method of operation?

“A. The manner in which it was manufactured itself. That is the—well, there’s an entirely different [332] approach to a gang saw operation and I am not in a position to tell you how that is to be done because I wasn’t there. I didn’t see it done.

“Q. But there was some change in the procedure of operating the mill? A. Yes.

“Q. And the result was that less employees were used in the operation of the mill, isn’t that correct?

“A. I would say that they reduced the—they reduced the employees in direct reduction of the operation.

“Q. Why were the number of employees reduced? A. They just fired them.

“Q. Do you know why?

“A. They—it’s just hearsay, but——

“Q. (Interrupting): Well, you don’t know of your own knowledge?

“A. I don’t know of my own knowledge, just from what they told me is all.

“Q. You don’t know what the production of the mill was after September the 10th, 1953?

“A. No.

(Deposition of Walter Friesen.)

“Q. So that you’re only talking about a ten-day period that you know of, is that correct?

“A. Approximately.

“Q. Had there been any other period prior to that time when the production of the mill varied, Mr. Friesen? A. Yes, I would say so. [333]

“Q. As a matter of fact, the production of a sawmill varies quite widely for one reason or another from day to day?

“A. Yes, depends on the logs and breakdowns and so forth.

“Q. There would be many, many factors that would do it. First is the type of logs you got?

“A. Right.

“Q. Second, the type of order you were cutting, correct? A. Right.

“Q. Third, the mechanical failure or presence or absence of mechanical failure? A. Right.

“Q. And there are undoubtedly other factors?

“A. Yes.

“Q. And in the operation of a sawmill you don’t get a steady day to day production where you would get eighty-five, eight-four, eighty-five; as a general rule it varies quite widely, doesn’t it?

“A. Well, we are taking a situation into account where the operation is an over-all operation from an annual basis and you would have an average factor that would be very applicable.

“Q. That’s correct.

“A. You could take one day and work four

(Deposition of Walter Friesen.)

nours and the next day work eight and naturally you would have different production.

“Q. So that you generally calculate your mill’s production over an extended period of time for that [334] very reason, don’t you, you usually take it on an annual or semi-annual basis?

“A. We worked on a monthly basis.

“Q. On a monthly basis. You took the number of days worked, divided it and came out with what your production was generally? A. Yes.

“Q. Now as the lumber was manufactured each day the lumber was trucked each day to Arcata?

“A. Yes.

“Q. Was there any lumber stored at the mill at all? A. Yes; there was.

“Q. All right. Now, as I understood you to say, you got your production figures from your truck tickets, is that correct? A. Yes.

“Q. The truck tickets would only represent the amount of lumber transported from the mill to Arcata, wouldn’t they?

“A. We reconciled our inventories, both beginning—both at the beginning and end of every month.

“Q. At the beginning of every month and at the end of every month? A. Yes.

“Q. How did you do that in this ten-day period? You had your beginning inventory but you didn’t have an ending inventory, did you, Mr. Friesen?

“A. We had—the Foreman at the mill who was

(Deposition of Walter Friesen.)

taking an average inventory as he worked every day, he would [335] do that.

“Q. An average inventory as he worked. Well, that wasn’t going to show up in your truck tickets, would it? A. Yes.

“Q. How?

“A. Because he was the—well, you would have to see the layout of the mill to see how it worked. They had a—I don’t recall the name of the thing, but it’s a jack I believe is what they call it. The lumber is pulled onto these jacks. When the jack is filled they have to move it. They can only put that jack on a trailer or a truck, and that is then moved either into town or to their storage place and taken off of the truck by a lift truck. In other words, the trailer is backed under the jack and the truck is backed under a jack in its completed packet of lumber, and so the tally is taken right from the green chain.

“Q. As each unit is completed?

“A. As each unit is completed and put on a truck or trailer and then if it is set out in the yard as an inventory item, it’s accounted for in its proper place in its location.

“Q. All right. And that lumber tally was only taken when a unit was completed to be moved, isn’t that correct? A. Right.

“Q. All right. Now, let’s assume that as of the [336] morning of September the first that all of those jacks, or whatever you call them, had been filled the day before and transported away so that

(Deposition of Walter Friesen.)

on this morning of September the first there was no lumber in there on hand at all?

“A. Uh-huh.

“Q. They sawed during that day. Their production was such that they didn’t complete each jack. They had some half completed, half full, and some three-quarters full and some a quarter full. How did you determine your lumber production for that day?

“A. All of the jacks that were completed were hauled out during the night.

“Q. That were completed and tallied when they were completed? A. Yes.

“Q. All right. But they were not tallied until they were completed, were they?

“A. The only difference being in the beginning and in the inventory of the actual piece tally on the green chain at the beginning and end of the month.

“Q. That’s correct, that was the only actual factual calculation you had, wasn’t it?

“A. That’s right.

“Q. That was at the beginning and the ending of a month and you then had an actual beginning and ending inventory and you then knew exactly what your production was? A. Right. [337]

“Q. But in the intervening period it was only an estimate at best, wasn’t it?

“A. Yes, but I think an estimate was very close. I think we had men experienced to give me that estimate when they did.

(Deposition of Walter Friesen.)

“Q. They gave it to you in what form?

“A. In written form.

“Q. In the form of a truck ticket?

“A. The truck ticket itself showed the number of tallies or number of units tallied out by dimension, by size, and the production order which the sawyer was working on had his own tally of the order that he had to complete of a certain number of two by fours, a certain number of other sizes and dimensions, and when that order was complete his work order came in to the office showing that being completed, and the information regarding the production of that particular order was assembled in the office showing how much they had on hand, either in the yard at Redwood Creek and also in—on hand in the yard near Arcata, and the tally being complete from the sawyer's records we knew how much there was that was to fill a certain particular order.

“Q. Yes. A. Well——

“Q. (Interrupting): Your sawyer's record was purely an estimate by the sawyer of what he calculated or [338] estimated the production of that particular order had been, isn't that correct?

“A. It was an estimate.

“Q. He calculated that by——

“A. (Interrupting): He would oversaw.

“Q. He would oversaw consistently to be sure in his own mind he had sawed enough to fill that order? A. Right.

“Q. So again it came down to the one fact that

(Deposition of Walter Friesen.)

there was really once a month that you knew what the actual sawmill production had been, that was by taking your beginning and ending inventory and calculating the difference when you actually knew what that mill production produced?

“A. Yes; I think so.

“Mr. Goodwin: That’s all.

“Redirect Examination

“By Mr. Hilger:

“Q. A jack is a receptacle in which you put lumber in the minute it comes out of the mill, isn’t that right? A. Yes.

“Q. It comes right off of the green chain?

“A. Off the green chain onto the jack.

“Q. And the jack holds one unit of lumber?

“A. It has its own quantity in that it fits a certain size truck. A unit as in this case was six or [339] seven thousand feet depending on the way it was scaled out.

“Q. How much would be in a jack?

“A. Well, that’s what it was, six or seven thousand feet. There was around ten to twelve thousand feet on a truck and trailer load.

“Q. And these were loaded aboard trucks immediately when each jack or unit was completed, right? A. Yes, uh-huh.

“Q. And any fragment of a unit or jack that remained unfinished at the end of one shift would be finished in the next one and moved out?

(Deposition of Walter Friesen.)

“A. Right.

“Q. So that if consistently you were taking off ten units of lumber per day for a period of ten days it would give you a fair average of your production during that time? A. I think so.

“Q. And it was on the basis of the records of these truck shipments over that period of time that you have made these estimates to which you refer? A. Yes.

“Q. Now then you kept all of these various records or they were kept under your direction while you were there at Timber Incorporated?

“A. Yes.

“Q. When you left there those were left in the possession of Timber Incorporated, were they not?

“A. Yes; they were. [340]

“Q. Did Mr. Peters ever tell you why he laid off these people during the first part of September? A. The only information I have——

“Q. (Interrupting): Well, did he tell you, did he give you a reason?

“A. Well, in my own opinion, it may have been his reason.

“Q. Well, he never did say so, though?

“A. No.

“Q. He never did say what it was?

“A. No.

“Q. Without going into what was said or what reason was given, did anyone ever give you a reason, that is, tell you why they were being laid off, and, if so, who? A. Dick, his son, did.

(Deposition of Walter Friesen.)

“Q. Dick Peters? A. Yes.

“Q. Was he employed there at the mill?

“A. Yes.

“Q. What was his capacity when he made this statement to you?

“A. Well, well, he was sort of a liaison man between the mill and the office making regular trips to the mill for parts and coming into the office and assisting with work relating to the other planer plant that they had in town.

“Q. And when did he state to you a reason—the reason for this lay-off?

“A. It was several days before I left. I don’t remember just how [341] many.

“Q. Would it be a week before, maybe?

“A. It was possible. I remember taking a vacation about four days in the latter part of August, some time after the 25th, until about the first, and it was just shortly after I returned that he——

“Q. (Interrupting): Do you remember where that conversation took place?

“A. In the office here in Arcata.

“Q. Timber Incorporated office? A. Yes.

“Q. Was there anyone present at that conversation other than yourself and young Mr. Peters?

“A. No.

“Q. And what reason did he give you for the lay-off?

“Mr. Goodwin: Just a minute before you answer that question. I want to——

(Deposition of Walter Friesen.)

“Mr. Hilger (Interrupting): You are reserving objections save as to form?”

“Mr. Goodwin: I want to ask—I guess it doesn’t make any difference. I had some questions that were more or less in the nature of voir dire, but go ahead.

“Mr. Hilger: If you want to, go ahead.

“Mr. Goodwin: Dick Peters was not employed by Timber Incorporated, was he? Wasn’t he employed solely by Peters Lumber Company?”

“A. Timber Incorporated was a corporation. I believe [342] that’s correct. I believe he was a partner of the Peters Lumber Company.

“Q. And he had no employment that you recall by Timber Incorporated, did he?”

“A. I believe that’s correct.

“Mr. Goodwin: Yes.

“Mr. Hilger: Well, other than young Peters, did anyone else ever give you—state a reason for these lay-offs other than young Peters?”

“A. Not that I recall.

“Mr. Hilger: I think that’s all.

“Mr. Goodwin: That’s all I have, Mr. Friesen.”

We would like at this time to read into evidence the deposition of Barbara Jarvella, taken on the 17th of January, 1957, pursuant to notice.

The Referee: Very well, proceed.

Mr. Hilger: Mr. Margolis, if you will officiate as respondent?

DEPOSITION OF BARBARA JARVELA

“Direct Examination

“By Mr. Hilger:

“Q. Your name is Barbara Jarvela?

“A. That’s right.

“Mr. Goodwin: Excuse me, Mr. Hilger, can I interrupt here to make the usual same objection to the jurisdiction and the taking of the deposition at this time as I have made in the previous [343] ones?

“Mr. Hilger: It’s so stipulated without repeating it. It’s so stipulated that the objection has been timely made.

“Mr. Goodwin: Thank you.

“Q. (By Mr. Hilger): Your name is Barbara Jarvela? A. Yes.

“Q. And you have previously given a deposition in this matter? A. That’s right.

“Q. You were the bookkeeper or did some bookkeeping at Peters mill or Timber Incorporated in 1953? A. Yes.

“Q. Do you recall the day that you started out there? A. 14th of August, 1953.

“Q. And in connection with your duties as bookkeeper there did you have occasion to post the records for the operations immediately preceding your time of arrival there?

“A. Well, not actual bookkeeping records, but payroll records.

“Q. I see. And you did have occasion to work with those? A. Uh-huh.

(Desposition of Barbara Jarvela.)

“Q. And in terms of shifts per day, what did those records reveal?

“A. At the time I actually started there?

“Q. No, for the period immediately preceding the time that you went to work there?

“A. They were on three shifts a day and I don't know just when it [344] was that they went off of that, but it was just a few days or a week before.

“Q. Before you went to work? A. Yes.

“Q. And after they went from three shifts, what number of shifts did they work?

“A. Two.

“Q. Now, did they go back up to three shifts while you were there, that's from August through October of 1953? A. No.

“Mr. Hilger: That's all. Thank you.

“Cross-Examination

“By Mr. Goodwin:

“Q. Mrs. Jarvela, how long did the mill run at three shifts a day?

“A. I have no idea as part of my working there.

“Mr. Goodwin: Thank you. That's all I have.”

The Referee: Take a ten-minute recess.

(Recess.)

Mr. Hilger: That concludes the Trustee's case, your Honor.

(Trustee rests.)

The Referee: Proceed for the Claimant.

Mr. Goodwin: We will call Mr. Peters.

S. A. PETERS

called as a witness for the Respondents; [345]
sworn.

Direct Examination

By Mr. Goodwin:

Q. Mr. Peters, you are president of Timber, Inc., is that correct? A. I am.

Q. You are the same S. A. Peters who entered into the contract that has been discussed in this matter with the Vander Jacks? A. I am.

Q. Subsequent to the execution of that contract, Mr. Peters, the contract was assigned to Timber, Inc.? A. Yes.

Q. That is a California corporation, is it not?

A. It is.

Q. Now, how long has Timber, Inc., been in business in Humboldt County?

A. Well, actual production, since about May of 1952.

Q. After entering into the agreement with Mr. Vander Jack, you commenced the construction of a sawmill, is that correct?

A. That is right.

Q. That is a gang mill located in what is generally known as the Redwood Creek area in Humboldt County, California?

A. That is correct.

(Testimony of S. A. Peters.)

Q. How many men does your organization employ?

A. Altogether, approximately 100. Close to it.

Mr. Hilger: When?

Mr. Goodwin: I say "do they employ."

Mr. Hilger: When? Now?

Mr. Goodwin: Now.

Mr. Hilger: What materiality has what they employ today? [346]

Mr. Goodwin: It is a preliminary question, your Honor.

The Referee: How can it be preliminary if it happened after all of this?

Q. (By Mr. Goodwin): Do you remember about how many men you employed in September, 1953?

A. Oh, it would be in the neighborhood of 50.

Q. Now, when was your sawmill completed, Mr. Peters?

A. About the first of May, 1952.

Q. It started operation about that time?

A. Well, slowly. It took us until about the middle of the month to get the bugs out of it.

Q. From what source did you obtain your logs?

A. Snow Camp, the Vander Jacks.

Q. Were all of the logs that were delivered to the mill after you started sawing delivered to you by Vander Jack?

A. That is correct.

Q. How long did that situation continue?

A. Until the latter part of October, 1953.

Q. The Vander Jack operation was your exclusive source of supply?

A. They were.

(Testimony of S. A. Peters.)

Q. Now, at that time that you started the operation of your sawmill was Mr. Vander Jack working in the area? A. Yes; very extensively.

Q. Was he working while the sawmill was under construction? A. He was.

Q. Where were the logs going?

A. Going to town. [347]

Q. After you started operating the sawmill, did that same situation continue? A. It did.

Q. Mr. Vander Jack was carrying on a logging operation, delivering part of the logs to you and part to town? A. That is right.

Q. That situation continued all during the operation up there? A. It did.

Q. Now, where were the logs scaled?

A. Well, we had a scaler right at our dump, just above the dump, on the road going down to the dump.

Q. Who employed this scaler?

A. It was a mutual deal. Mr. Vander Jack employed him, but we paid half his salary.

Q. He was a mutually acceptable scaler; his wages were shared by you and Vander Jack?

A. That is right.

Q. At least part of this period of time, June, 1952, to October, 1953, that was Mr. Merle Montgomery?

A. I won't say he was there at the very beginning, but it was not long after we got started that he was.

Q. And he scaled the logs as they were brought

(Testimony of S. A. Peters.)

to the mill? A. That is right.

Q. And those scale tickets were the method of computing the volume upon which you paid for the logs? A. That is correct.

Q. How often were the logs paid for?

A. Twice a month.

Q. Now, Mr. Peters, at any time during this period, June, 1952, [348] to October, 1953, did you have any conversations with Mr. Vander Jack concerning the quality of the logs being brought to you? A. Yes; I did.

Mr. Margolis: I am going to object to the question as suggestive and leading; speak of any conversations, what was said.

The Referee: Well, he said if he had conversations. He has not asked what was said.

Mr. Margolis: He put words in his mouth, as to the quality. He did not ask for the conversation. I object to it as suggestive and leading.

The Referee: It is suggestive and leading, but it may stand.

Q. (By Mr. Goodwin): On what occasions did you have such conversations with Mr. Vander Jack?

A. Well, especially during the late spring and summer of 1953.

Q. Was there more than one conversation?

A. Yes; there was.

Q. Do you remember any specifically by date?

A. No; I would not want to set a definite date,

(Testimony of S. A. Peters.)

but there were several conversations I had during the fall.

Q. Of 1953?

A. Yes. I even rode to town with Mr. Vander Jack from the mill. I left my car and drove to town to discuss it further.

Q. On the particular occasion that you rode to town did you discuss the logs? A. Yes. [349]

Q. What was the conversation between you and Mr. Vander Jack?

Q. (By Mr. Hilger): When did you ride into town? October? A. July.

Q. (By Mr. Goodwin): What was the conversation between you and Mr. Vander Jack?

A. That is when the discussion came up to begin with about the price of the log, the quality of the log, and the amount of logs we could use, and the logs that were going to town.

Q. What did you say to Mr. Vander Jack about the quality of the logs, if anything?

A. I told him I thought we were getting the worst part of the deal; the good logs on the trucks—we could see them—were going to town.

Q. Did he make any comment?

A. No. Once in awhile it would change for a day or two, but go back to the same old deal. The good logs continued to go to town.

Q. On another occasion during the summer of 1953 did you talk to Mr. Vander Jack about the logs? A. I did.

Q. What was this conversation?

(Testimony of S. A. Peters.)

A. Practically the same.

Mr. Hilger: When? During 1953?

Q. (By Mr. Goodwin): What period?

A. Well, probably one instance, at least, was in August; probably another in September. We had several conversations, but to pin it down to a date, I could not do that.

Q. Would it be in the summer logging season of 1953?

A. It would be in the summer logging season of 1953, yes. [350]

Q. And, on those occasions did you discuss the quality of the log? A. We did.

Q. Did any improvement result after the conversations? A. No.

Q. Now, you observed the logs that Mr. Vander Jack was taking to town? A. Definitely.

Q. Were any of those gang logs?

A. A good portion of them were.

Q. A good portion were gang logs?

A. Right. They would come down and go right around our pond; Montgomery would scale them; they would go around and hit the county road. We could not help seeing them.

Q. Did you observe the quality?

A. Yes; they were beautiful gang logs.

Q. How did they compare with the quality you received? A. No comparison.

Q. What do you mean?

A. They were so far superior to what we received.

(Testimony of S. A. Peters.)

Q. Better logs?

A. Better logs, definitely.

Q. Now, at any time during this operation, Mr. Peters, did you ask Mr. Vander Jack to increase or decrease his logging operation up there?

A. I tried to get him to decrease it.

Q. Did you ever ask him to increase it?

A. Never.

Q. You say you did ask him to decrease it?

A. Yes.

Q. Did Mr. Vander Jack discuss with you at any time the fact [351] that he was going to, or did, acquire more logging equipment?

A. I had nothing to do, nor did I ever discuss his logging requirements with him.

Q. He never discussed his equipment with you?

A. No; he never did.

Q. Now, at any time during this operation did you and Mr. Vander Jack discuss the possibility of your building a second mill? A. We did.

Q. Did you also discuss with him the possibility of putting in a cold deck for the winter?

A. We did.

Q. When were these discussions?

A. It would have been in the spring of 1953, but due to my inability to get financing, we could not put in the cold deck that we wanted.

Q. Did you discuss with Mr. Vander Jack that you would need financing?

A. That I would need it? Definitely.

Q. You did go ahead with these plans?

(Testimony of S. A. Peters.)

A. That is right.

Q. Did he participate to any extent in any financing?

A. No. He did go to Portland with me once, where we went in and talked to the banker. Their reaction was they would not go along with it.

Q. The financing?

A. That is right—would not make it available.

Q. Now, at any time during this operation did —withdraw that.

How many shifts a day did the sawmill run?

A. After we got it into production in 1952, we immediately [352] went to two shifts. As soon as we could secure capable men to run it, why, we did go to two shifts.

Q. And how long did you continue on two shifts?

A. We have always been on two shifts, with the exception of possibly 30 days; maybe a little longer, maybe a little less; when we attempted three shifts.

Q. When was that?

A. That was in the summer of 1953.

Q. You say for 30 days, more or less, you did run on three shifts?

A. That is right. That was a very expensive deal. In the first place, it increased our costs; in the second place, it decreased our production.

Q. Did you discontinue the operation of three shifts?

(Testimony of S. A. Peters.)

A. We did; we discontinued the operation of three shifts.

Q. As I understand from your statement, the reason was that the costs went up, but the production did not?

A. That is right. Our actual production went down.

Q. Now, this mill is located in a more or less isolated area? A. That is right.

Q. Was there adequate labor available in the area?

A. No; we would have to bring it in, run crew cars back and forth to town. We built houses, did everything we could to get available men. Well, you would have to understand. To operate a saw-mill, they come and go. A fast labor turnover.

Q. It is a big labor turnover?

A. A big labor turnover, yes. [353]

Q. That is the only time you ran three shifts?

A. That is the only time.

Q. Now, Mr. Peters, Mr. Friesen, in his deposition introduced this morning, testified that during the first ten days of September there was a decline. In September, 1953, there was a decline in the production of the mill. Is that true?

A. Yes. I think what it was, just about that time we had a very major breakdown.

Q. You had a major breakdown in the mill?

A. That is right.

Q. That required extensive repairs?

(Testimony of S. A. Peters.)

A. We were down practically two weeks, or more.

Q. At which time the mill would not be producing anything? A. That is right.

Q. During September, 1953, was there a green chain tally kept of your lumber production?

A. No; we never kept a tally of the green chain. It has been estimated. The ticket was signed and given to the trucker. The trucker was under contract, or doing the job for so much. We just arrived at an arbitrary figure that we thought would be reasonable to both sides. That was the figure used. There was never a tally taken.

Q. This estimate was of lumber he was hauling?

A. That is right.

Q. For the purpose of arriving at compensation?

A. For the purpose of arriving at compensation for him, nothing else. [354]

Mr. Margolis: Compensation for whom?

A. The trucker who owned the trucks.

Q. (By Mr. Goodwin): I believe you testified previously you did take a beginning of the month and ending of the month inventory?

A. We do now. We did after everything operated up there, but several months we did not have an ending inventory.

Q. The purpose of that is to determine your production?

A. That is the only way you can determine it.

Q. Now, did you at any time prior to October

(Testimony of S. A. Peters.)

21, 1953, cause any check-scaling to be done of logs delivered by Vander Jack?

A. Yes; we did. We put in our check scaler a week, possibly ten days ahead of that time—at least a week.

Q. What time?

A. That Mr. Vander Jack was bringing logs to us.

Q. You brought in a check scaler?

A. We did.

Q. That was your own employee?

A. That was our own employee, and we put him in for the express purpose of checking the logs, getting the grade, getting the scale, to compare against tickets we were getting from Montgomery.

Q. Who paid this man's wages?

A. Timber, Inc.; no one else.

Q. Do you remember his name?

A. Yes; Richard Knolin.

Q. Where is he?

A. In Texas. I don't know whether he is alive today or not. He was down there in the [355] hospital.

Q. He was there a week or ten days before the log deliveries ceased?

A. That is right.

Q. His function was to check the scale?

A. Every load.

Q. For the company's information?

A. That is right.

Q. You paid his wages?

A. We paid his wages.

(Testimony of S. A. Peters.)

Q. Was he ever used for the purposes of calculating footages for payment to Vander Jack?

A. No.

Q. As long as logs were delivered to you by Vander Jack, whose scale was used for the purposes of payment? A. Montgomery's.

Q. Do you know of any logs having been delivered to your mill for which you did not pay Mr. Vander Jack?

A. Not to my knowledge, no, sir.

Q. Was any bill for logs, anything like that, ever given to you for logs claimed not to be paid for? A. Well, no, there never has been.

Q. Now, as long as Mr. Vander Jack continued to deliver logs to you, then, so far as you know they were scaled by Mr. Montgomery, and you paid on his scale? A. That is correct.

Q. During the summer logging season of 1953 did you acquire a cold deck of logs?

A. Yes, we did. We started in and put up a few, as much as we could get financing for.

Q. Were these Vander Jack logs?

A. They were Vander Jack logs, definitely. [356]

Q. How many logs did you accumulate in that cold deck?

A. As I remember, approximately 1,300,000 feet.

Q. That would be one million three hundred thousand feet on Mr. Montgomery's scale?

A. That is correct.

Q. You paid Mr. Vander Jack for those logs?

(Testimony of S. A. Peters.)

A. We did.

Q. What was the average price you paid for the logs?

A. At that time I should judge right close to \$36.00 a thousand.

Q. Now, thereafter did you ever check that scale on the cold deck?

A. Yes. When those logs were torn down and used in the sawmill we had the scaling bureau in Arcata come up and scale them—the Northern California Log Scaling and Grading Bureau.

Q. That is the organization Mr. Barrett was manager of? A. Yes.

Q. Are these the same logs and the same scaling Mr. Barrett referred to in his testimony?

A. They are.

Q. What was the result of the check scale?

Mr. Hilger: I object, and will ask a question on voir dire.

Q. Were the scales of the bureau given you in writing? A. Yes.

Mr. Hilger: I object on the ground that the record is the best evidence of what it shows.

Mr. Goodwin: We have it, but we did not want to clutter [357] up the record.

The Referee: Let's have the record.

Q. (By Mr. Goodwin): I show you the reports of the scaling bureau, what purport to be reports of the scaling bureau. Are these the reports you received? A. They are, yes.

Q. This was on the basis of the check scale?

(Testimony of S. A. Peters.)

A. Correct.

Q. According to the calculations at the foot, it shows 936,570 feet of logs, is that correct, in your check scale?

A. I think that is just about right, yes.

Mr. Goodwin: Your Honor, we can introduce this in evidence, but I hesitate to——

Mr. Hilger: We will stipulate that the total shown as net footage is 936,570.

Mr. Stark: Is the record here now that as between Montgomery's scale of the cold deck and the scale taken by the scaling bureau there is a difference of 1,300,000 feet against 936,570 feet?

Mr. Hilger: There is nothing like that stipulated. I will stipulate that the total shown on these papers show 936,570.

Mr. Stark: I did not ask for a stipulation. I just asked if that is what the record shows.

Q. (By Mr. Goodwin): Mr. Peters, did you go over your records to obtain the difference in the volume in the cold deck according to Mr. Montgomery's scale? A. Yes. [358]

Mr. Margolis: May I have the number of that page?

The Reporter: Page 44.

(Question read by the reporter.)

Mr. Margolis: I object on the ground that no proper foundation has been laid as to time.

Mr. Goodwin: I just asked, first, if he did.

Mr. Margolis: I withdraw my objection.

(Testimony of S. A. Peters.)

The Referee: That is all that is before me now. He may answer.

Q. (By Mr. Goodwin): Did you answer the question? A. Yes; we did.

Q. Did you prepare a summary showing the total footage in the cold deck from your records?

Mr. Margolis: I am going to object to the question, if it please your Honor, on the ground that no foundation has been laid for the first question. When?

Mr. Goodwin: I am just asking if he did prepare a summary.

Mr. Stark: He is going to ask when he did it.

Mr. Margolis: I withdraw the objection, your Honor.

The Referee: Very well.

A. We did.

Q. (By Mr. Goodwin): Is this the work sheet that you prepared, Mr. Peters? A. Yes.

Q. From the records?

A. That is the sheet we took the recap off on.

Q. Whose handwriting is this?

A. That is mine. [359]

Q. You have done this recently?

A. No; not too recently. I worked at it quite a little while back.

Q. Do you remember when?

A. Oh, I would say it is approximately three months ago; maybe a little more.

Q. What do these records reflect? The volume

(Testimony of S. A. Peters.)

of logs in the cold deck according to Montgomery's scale?

Mr. Hilger: Pardon me. Do I understand this came from records of Peters and Timber, Inc.?

Mr. Goodwin: Right.

Mr. Hilger: Hasn't he already testified he kept no such records? I would like to see the records. Before any discussion of what is shown in there, or any further questions regarding it, I want to see the records.

Mr. Goodwin: Well, your Honor, the records in an operation of this type are multitudinous. Just as Mr. Hilger did in presenting his summaries here, certainly we have a right to put in a summary of the records. He has had a period of months for discovery. They are available to him. If he wants to look at the records, he can do it.

The Referee: I think if he objects to it as not the best evidence, the records will have to be brought here.

Mr. Hilger: As counsel states, we came in with a summary. However, we packed in the records, and they are in evidence.

If you want to pack in the records, and I am satisfied this is an accurate tabulation, I am willing to go along.

Inasmuch as we subpoenaed the self-same records they have [360] summarized, and Mr. Peters sat on the stand and said, "We do not keep any such records," I would at this time object to this.

(Testimony of S. A. Peters.)

Mr. Goodwin: Let's see your subpoena where you asked for something we did not give you.

Mr. Hilger: The daily log purchases for August and September, 1953. You gave us invoices and said that is all you kept; you kept no scale tickets. We asked for the log scale; we did not get it.

Mr. Goodwin: That is right. This is not a log deck scale. He asked for the log deck scale. As we advised him, they were not there.

The Referee: Let the records be produced.

Mr. Stark: Is it not the rule that where the records are voluminous, a summary may be substituted in lieu?

The Referee: Not over an objection that it is not the best evidence.

Mr. Stark: I believe there is. I don't recall, but I am under that impression.

The Referee: I think it is a matter of the discretion of the Court. The Court decides that the records will be produced before the summary is introduced in evidence.

Mr. Goodwin: Is that your ruling?

The Referee: That is my ruling.

Q. (By Mr. Goodwin): Now, Mr. Peters, you had a log dump and pond at this mill, did you not?

A. Yes.

Q. And the logs were delivered to the dump at the pond by Mr. [361] Vander Jack?

A. That is correct.

Q. During this period we are talking about, they were scaled at that pond?

(Testimony of S. A. Peters.)

A. That is correct.

Q. Now, how big of a pond was this?

A. Approximately eight acres.

Q. And was the log pond and log dump constructed according to the customary log pond and log dump constructed in that area?

A. Yes. It is an exceptionally good dump.

Q. Now, did you have any employees or pond men that worked on the dump and the pond?

A. Yes.

Q. During this same period of time?

A. Certainly.

Q. Were they full time?

A. Full time men. I had them both on a day shift and night shift.

Q. And they handled the logs in the pond, moving them?

A. That is right.

Q. They also worked on the log dump?

A. That is correct.

Q. Did Mr. Vander Jack complain to you about the dump being plugged?

A. Yes; once or twice he did, but as far as the dump itself is concerned, it was never plugged more than anyone's else's dump. More or less, in the heavy production season, you get a plug now and then. You cannot help it.

Q. Was your log dump plugged more than the average of other sawmills you have seen in the area?

A. I would not say so.

Mr. Margolis: Objected to on the ground that no foundation [362] has been laid. We have no

(Testimony of S. A. Peters.)

evidence of what other mills in the area had, the size or number of logs. On the further ground that it is incompetent, irrelevant and immaterial, and not within the issues of this proceeding.

The Referee: It might be rebuttal of the testimony of Mr. Vander Jack, but the other objection is good.

Mr. Goodwin: I think so, too, your Honor. I withdraw the question.

Q. You have been in the sawmill business for several years, Mr. Peters? A. I have.

Q. You have been familiar with sawmills for many years? A. That is right.

Q. You have had occasion to look at log dumps and log ponds in Humboldt County, California, for five or six years? A. Yes.

Q. Have you had occasion to watch logs being delivered by truck? A. I have.

Q. At other mills besides your own?

A. Correct.

Q. You devote all of your time to the operation of this sawmill? A. I do.

Q. In your opinion, was your log dump, during this period of time, blocked or plugged more than other mills you have had under observation over these years? A. No.

Q. On the occasions the dump was plugged, what caused it to be plugged?

A. Too many trucks bunching up, coming in to dump all at one time. They came in bumper to bumper. [363] It does not take long to plug a

(Testimony of S. A. Peters.)

dump under those circumstances, no matter how large it is.

Q. During the logging season were the deliveries spaced evenly, or were they not?

A. They were not.

Q. How did that operate?

A. Well, before the heavy season, or heavy production came on, they would not produce as many logs in the woods. Therefore, the dump could be kept open much easier. When they got into the heavy production through the summer months we got a bunch of trucks in at one time. You cannot keep a dump open. We did work practically every night there opening it up, getting ready for the next day.

Q. Do you have lights up there?

A. Lights? Yes.

Q. Do you have employees, or an employee who worked at night on the dump?

A. We did, yes.

Q. No logs were delivered at night?

A. No.

Q. The logs were delivered during the daytime, and you had a man on full time during the day, and also at night? A. That is right.

Q. When did Mr. Vander Jack discontinue delivering logs to your mill?

A. About October 21st of 1953.

Q. Prior to that time, or subsequent to that time, did you refuse at any time to accept Mr. Vander Jack's logs? A. No.

(Testimony of S. A. Peters.)

Q. Did you ever tell Mr. Vander Jack that you would only pay \$28.00 for the logs?

A. I never made any such statement. [364]

Q. Did you ever tell Mr. Vander Jack you would not accept Mr. Montgomery's scale?

A. I never did.

Q. Did Mr. Vander Jack notify you in any shape, by any method, that he was not going to deliver any logs to you? A. No; he did not.

Q. When was the first time that you knew logs were not being delivered?

A. When he just quit bringing them. For several days he quit bringing any volume, and all of a sudden he just stopped.

Q. Did Mr. Vander Jack have any discussions with you subsequent to October 21, 1953?

A. Regarding the logs?

Q. Regarding the delivery of logs.

A. Yes; we had several discussions.

Q. After October 21, 1953?

A. No; nothing after October 21, 1953.

Q. Prior to that? A. That is right.

Q. In any of the discussions did he ever tell you he was not going to bring any more logs?

A. He never did.

Q. After October 21, 1953, did Mr. Vander Jack continue his operation up there?

A. He did.

Q. What did he do with the logs?

A. Took them all to town.

Q. He took them all to town? You did not get

(Testimony of S. A. Peters.)

any of them? A. That is right.

Q. Now, at that period of time, was there a market for logs in the Arcata area?

A. Yes. [365]

Q. Were there other log-buying mills?

A. They practically all were log-buying mills.

Q. Almost all mills in the area are log-buying mills? A. That is right.

Q. So there were several mills, or many mills, that would or did buy logs on the market?

A. That is right.

Q. Fir logs? A. Fir logs.

Q. Do you know how long Mr. Vander Jack was operating in the Redwood Creek area?

A. Some time in 1954, June or July, I believe.

The Referee: You mean how long after?

Mr. Goodwin: Yes, your Honor.

The Witness: Yes.

Q. (By Mr. Goodwin): Where was the timber that was being logged located with reference to your mill?

A. It was right adjacent to it, probably within a radius of four or five miles.

Q. In what direction?

A. From the mill?

Q. Yes.

A. With the exception of on the west, it almost circled the mill on three sides, north, east and south.

Q. Was the sawmill located on the same ownership or same property the timber was?

(Testimony of S. A. Peters.)

A. Yes.

Q. In other words, it was all one holding?

A. That is right. The people who owned the timber also owned the land.

Q. With reference to the plugging of the dump, Mr. Vander [366] Jack, you say, did complain to you on one or two occasions about this?

A. He did.

Q. Do you know when that was, approximately?

A. Oh, I would say it was probably during August, possibly the first part of September.

Q. Of 1953? A. Of 1953.

Q. What did you say or do, if anything?

A. We made every effort all the time to keep it open.

Q. Is that what you told him?

A. Yes. I tried to get him to adjust his trucks, or spacing a little bit. Once you get a bunch of logs dumped in front of your dump, it takes work to get it open.

Q. What was Vander Jack's operation with reference to town deliveries and deliveries to your mill? Was there any general plan?

A. It seemed to be we would meet practically all the trucks going to town in the morning. Then along in the afternoon quite late they would pour into us. That way it would block the dump.

Q. During the logging season that is the way they operated? A. That is right.

Q. That is when your plugging occurred?

A. That is right.

(Testimony of S. A. Peters.)

Q. Now, to get to your log dump, Mr. Peters, it was over a private road, is that right?

A. To the dump itself, that is right.

Q. That is more or less a one-way road, [367] was it? A. Yes.

Q. In other words, trucks had to go in the same direction? A. Correct.

Q. Single file?

A. Single file around the pond to the north and into the county road.

Q. A log dump is so constructed, is it not, so that only one truck can be accommodated at a time, so far as dumping is concerned? A. Yes.

Q. When a truck pulls up to a dump, during your operation there, and Mr. Vander Jack's, was that the place then and there the logs were scaled?

A. No, they were scaled just before they got down to the dump. We had a platform back up the road maybe 200 or 300 feet.

Q. The trucks pulled aboard the platform?

A. Pulled aboard the platform and were scaled, and there is a space maybe for three or four trucks between there and the dump.

Q. After they are scaled, they pull on down to the dump? A. That is right.

Q. Mechanically, how were the logs actually dumped?

A. Well, there is two straps that we put in underneath of the logs between the reach and the log itself. Then we have a hook; there are eyes in

(Testimony of S. A. Peters.)

the strap; this hook is hooked into the eyes. We have a double drum with an electric motor on it. We start that up, tighten the straps under the logs. Now, there are fastenings outside of the brow log, and the brow log is the [368] height of the bunks on the truck. Then, when the straps are tightened up, the truck driver takes the binder chain off, which frees the logs. We pull up with our motor, and as the strap tightens the logs it forces them down into the water. The straps are what dump the logs.

Q. Roll them off?

A. Roll them off the truck, that is right.

Q. And they go down into the water?

A. Into the water.

Q. There are logs situated there so they roll down?

A. Yes. We have a row of logs commencing approximately at the top, into the water.

Q. After they get into the water, how does your crew process or handle the logs? What happens then?

A. They were immediately straightened out and started off toward the south end of the pond, where they are bucked for length and go through the mill.

Q. You mean your pond man would push, move the logs over toward the mill?

A. That is right.

Q. You had an area there where you sawed the logs the desired length?

(Testimony of S. A. Peters.)

A. Yes, unless they were going to be decked. If they were going to be decked, they went to the north end and were put in a log boom over there to put into the deck whenever we had time to do it.

Q. The balance that did not go into the deck, you transported into the mill, where they were sawed? A. That is correct. [369]

Q. Now, is that the customary fashion, from your experience, of handling logs for a sawmill that has a pond? A. Yes.

Q. Were the other mills in the area, that you know of, handling logs in the same fashion during this period?

A. Yes. Some had a little more trouble. They did not have as much water or as big a space as we had in the pond.

Mr. Goodwin: Could we take our noon adjournment now?

The Referee: Yes; 2:00 p.m.

(Adjourned to 2:00 p.m.) [370]

Monday, January 21, 1957—2:00 P.M.

(Afternoon session reported by Mr. William Castle.)

The Referee: We will proceed with the Snow Camp Logging Company case.

Mr. Goodwin: Will you resume the stand, Mr. Peters?

S. A. PETERS

recalled as a witness on behalf of the Respondents; previously sworn.

Direct Examination

(Resumed)

By Mr. Goodwin:

Q. Mr. Peters, what were the names of some of the pond men that worked on the pond during the summer and fall, up until October 21, 1953; during that period?

A. Cecil Phillips and Everett Edwards.

Q. They are still in your employ?

A. They are.

Q. Now, going back to the accumulating of the cold deck, Mr. Peters, you testified—that is, during 1953—you testified this morning that you accumulated a cold deck, and that there were some records showing the volume in that cold deck at Mr. Montgomery's scale. Do you recall that testimony? A. Yes.

Q. Now, I show you some documents that are entitled "Warehouse Receipt of the Lawrence Warehouse Company," consisting of five sheets. Can you identify that? A. I can.

Q. What are those records?

A. These are the [371] warehouse receipts on logs that were cold-decked, and on which we obtained financing.

Q. Is this the same cold deck that you testified about this morning? A. It is.

Q. And do these receipts show the total volume

(Testimony of S. A. Peters.)

of logs in that cold deck? A. They do.

Mr. Stark: That were scaled.

Q. (By Mr. Goodwin): And that was the volume calculated on Mr. Montgomery's scale?

A. It is.

Q. Is that the same volume in the cold deck that you paid the Snow Camp Logging on?

A. It is.

Q. What is the total of that?

A. A million two hundred sixty-eight thousand five hundred ten feet.

Mr. Goodwin: We offer these warehouse receipts as our next exhibit in order; I think number——

The Referee: No. 3.

(Lawrence Warehouse Company Receipts Nos. W 31214, W 31216, W 31217, W 31218 and W 31219, were admitted in evidence as Claimant's Exhibit No. 3.)

Q. (By Mr. Goodwin): Since October 21, 1953, where have you acquired your logs, or how have you acquired logs?

A. Any place that I could get them; either by timber or by logs—any way to get logs.

Q. In the delivery of logs to your mill have you experienced any increased items of cost over that that prevailed under the Vander Jack arrangement?

A. Yes; trucking, especially. [372]

Mr. Hilger: One moment. Before we pursue that

(Testimony of S. A. Peters.)

any further, would any of these items be reflected in your books or records, Mr. Peters?

The Witness: Certainly.

Mr. Hilger: I object, then, to any testimony in that regard from this witness, without the books and records, as not being the best evidence.

Mr. Goodwin: I think he can testify of any increased cost he has experienced from his own knowledge, your Honor, whether or not there is a record of it; anything he knows, himself.

Mr. Hilger: As your Honor will recall, during the first day of the session in this matter we attempted to prove certain elements of damage in this same way, and the objection was made that if these items appeared in books and records they would be the proper evidence, and we have produced them; and make the same request of this witness.

Mr. Goodwin: I don't think it is quite the same situation, your Honor, because at that time the testimony was to seek to develop by the witness, Mr. Vander Jack, of what his books and records said. This question is directed to the witness, of his own knowledge, of any items of increased cost that he has experienced.

The Referee: He says set forth in his books.

Mr. Goodwin: That statement was produced by Mr. Hilger on voir dire, and the fact that there is a record, I submit, doesn't make it the best evidence, if that man has his own personal [373] knowledge of what operating experience he had.

(Testimony of S. A. Peters.)

Mr. Stark: In other words, your Honor, what my colleague is trying to say is that if Mr. Peters knows of his own knowledge that it is costing him twelve dollars to haul logs that he now is acquiring as against eight dollars if Vander Jack was living up to his agreement, he would be entitled to so state without the production of records, because the records are kept under his supervision. He is the boss. As a matter of fact, the best evidence rule is where a witness testifies to something that is without his personal knowledge.

The Referee: No, not necessarily, not necessarily.

Mr. Hilger: Well, to use counsel's own words, we don't feel constrained to allow this witness to guess money out of our pockets. He has records which he says would reveal these items. They are the best evidence of what did, in fact, take place. The personal knowledge of what those records contained is a different thing from having the records before us. I submit again that the best evidence of these items, which admittedly appear in his books and records, are the books and records.

Mr. Goodwin: But, your Honor, there is the distinction that is of importance here. The question which I asked this witness was, does he know of his own knowledge of any increased costs incurred by him since the termination of this operation in acquiring logs from other sources, and he says, "Yes, I do."

Mr. Stark: Hauling, particularly.

(Testimony of S. A. Peters.)

Mr. Goodwin: Hauling. [374]

Mr. Hilger interposes with a voir dire: "Is a record made of that? Would that also be shown on the books and records?"

And he says, "Yes." But he also testifies he knows of certain costs of his own knowledge.

Mr. Stark: That would be the best evidence.

Mr. Goodwin: I submit the fact that there is some written record that corroborates that does not make his own personal testimony inadmissible. For example, your Honor, it is much like this: An eye witness to an accident can testify to what he saw and what he knows went on there, even though he might have written a memorandum about it later.

Mr. Stark: I think that is very apt. You wouldn't be entitled to read the memorandum unless he was able to testify from his own knowledge of what the occurrence was.

The Referee: It isn't the same thing, because this is not a record of that character, it is a record of what shows in his books.

Mr. Stark: No. You see, your Honor, where we are inclined to fall into error is that if this witness testifies that it costs him X dollars now, as against Y dollars then, and our opposition suspects that is incorrect, they can develop it as being such. That is their protection.

Mr. Hilger: We advanced that argument in support of our efforts to have this same matter, the manner of presenting evidence, and the Court quite

(Testimony of S. A. Peters.)

properly held that they would allow that—the Court would allow no such slip-shod guessing [375] when a record was available that would contain and reflect the facts of what actually did take place. Now, if these matters are reflected in records which this man caused to be kept, then those documents which he, himself, created, are the best evidence of what he did, and he should not be allowed to guess or approximate without producing those records.

Mr. Stark: The best evidence rule, your Honor, is this—and I know that you know it—the best evidence rule is, is there being produced the highest form of evidence that is available? Now, the knowledge—the personal knowledge—of the witness as to what has occurred is the highest type of evidence. It is superior to records, because records can be altered.

The Referee: Memory can be faulty, too.

Mr. Stark: Right. And——

Mr. Hilger: But——

Mr. Stark: Wait a minute, please.

And if counsel suspects that his memory is either faulty, or that it is venal, he has his remedy by cross-examination, one, and asking that we produce the records and examine them himself.

Mr. Hilger: I am asking at this time specifically that they do produce those records, so I can cross-examine this witness intelligently regarding what took place. If I merely have his statement that it costs twelve dollars to haul now, compared to ten

(Testimony of S. A. Peters.)

later on, how can I cross-examine him? He has made a statement. I have no basis upon which to ask him how he arrived at that conclusion, in the absence of any records. That [376] is the purpose of the best evidence rule, is to get the records of what took place before the Court, so that the facts as recorded at the time can be before the Court.

Mr. Stark: And how, pray, do you cross-examine records?

Mr. Hilger: You can cross-examine a witness' testimony concerning records a lot better.

Mr. Stark: You don't want that, you said.

Mr. Hilger: Are they afraid to produce these records?

Mr. Stark: Of course not. We are not afraid to produce anything.

Mr. Hilger: If they support the witness' testimony, let's have them.

The Referee: I guess you will have to produce the records.

Mr. Goodwin: Very well, your Honor.

The Referee: Objection sustained.

Mr. Stark: I think we retreated, as you will recall, your Honor, from the position we took in regard to these depositions. Your Honor was prepared to sustain our objection, but we retreated from it, in the interests of expeditiousness. Now, we will produce these records if we conclude, after consulting with each other, that it is vital to the interests of our client that we produce them. But we don't want to keep your Honor sitting here day

(Testimony of S. A. Peters.)

after day after day with time we can ill afford to spend, when this witness, as the head of this company, is prepared to say unequivocally that, after Mr. Vander Jack left the scene of this debacle, he was required to go out at [377] additional expense, the amount of which he knows of his own knowledge, and get fodder for his mill.

The Referee: Are you finished?

Mr. Margolis: May I make one observation?

The Referee: I have ruled.

Mr. Hilger: He has ruled. That is all.

Mr. Goodwin: You may cross-examine.

Cross-Examination

By Mr. Hilger:

Q. Mr. Peters, Mr. Vander Jack, or Snow Camp Logging, discontinued deliveries of logs on or about October 21, 1953, is that right?

A. Correct.

Q. On or about that same date Walker Brothers began delivering logs, did they not?

A. Not to my knowledge they did not.

Q. Did you keep a record of what those log purchases were and when they began?

A. We probably have, yes.

Q. And they would reflect when Mr. Walker began delivering logs, would they not?

A. No—they would reflect when he began, yes.

The Referee: What is the answer?

Mr. Hilger: "Yes, they would reflect when Mr. Walker began."

(Testimony of S. A. Peters.)

Mr. Stark: And the next question I am going to object to on the ground it wouldn't be the best evidence.

The Referee: Wait a minute.

Read counsel's question, and read his answer.

(Question and answer read by the [378] reporter.)

Mr. Stark: I guess the "No" was a Freudian slip. What he meant, obviously, was——

The Referee: What kind of slip?

Mr. Stark: A Freudian slip.

Mr. Hilger: We will allow the witness to clarify it.

Q. Would your records of log purchases reveal when Mr. Walker began delivering logs there?

A. They should, yes.

Q. Now, you testified that your mill was shut down during the early part of September, due to a breakdown?

A. That is correct.

Q. And you keep payroll records, do you not?

A. Certainly.

Q. Those payroll records would reflect whether or not that mill was, in fact, shut down during '53, would they not?

Mr. Stark: We object to that as not the best evidence. The payroll records would be the best evidence.

Mr. Hilger: I didn't ask what they showed. I asked if they would reflect—if that information would be reflected in the payroll records.

(Testimony of S. A. Peters.)

The Referee: Well, that calls for his conclusion. Of course I know it is cross-examination. All you want to know is whether he has records?

Mr. Hilger: I want to know if he has payroll records and, if produced, those payroll records would not reveal whether or [379] not this mill was operating during the first part of September, 1953.

Q. Do you know whether or not those records would reveal that?

A. Well, even though we were shut down, probably every man we had at the mill was working. So it wouldn't prove anything. But I could look up and tell you when we were shut down, because I would have the exact date we broke down.

The Referee: You have a record of that, haven't you? A. Certainly.

Q. (By Mr. Hilger): Do you make a practice of keeping all of your mill hands on the payroll during extensive periods of shutdown?

A. Those that are in need, yes; not all.

Q. There would be quite a number of them that wouldn't be on the payroll during that period?

A. There would be some, yes; and a lot of them that would be.

Q. And that would be reflected in the records?

A. Yes.

Q. Now, you have read the testimony of Mr. Friesen. He was your bookkeeper, or accountant,

(Testimony of S. A. Peters.)

during the summer and early fall of 1953, wasn't he? A. He was.

Q. You have heard him testify regarding the truck tickets and records—the production records—that he kept, have you not?

A. Yes, I have heard his testimony.

Q. And those records, if produced, would show the production at the mill during the months of September and October, '53? [380]

A. No, they are nothing but an estimate.

Q. You paid your truckers on that estimate, didn't you? A. On lumber hauled, yes.

Q. And the manner of paying those truckers was on so many feet of lumber hauled, was it not?

A. On an estimate, yes.

Q. And that estimate was acceptable to you for hauling purposes and paying, and it was acceptable to the trucker? A. That is right.

Q. And it was made by the mill foreman?

A. No. We finally got rid—the mill foreman wasn't there. It was made by the trucker, himself, and checked by the logging superintendent—I mean the mill superintendent.

Q. Was checked by the mill superintendent, and it was accepted as the proper base upon which to compute your transportation costs?

A. That is right.

Q. And if the trucker left your mill and only delivered a certain amount of lumber which agreed with the estimate, you would be satisfied that he

(Testimony of S. A. Peters.)

had delivered to you all the lumber they took, would you not? A. Yes.

Mr. Goodwin: If your Honor please, I am going to object to that. It is speculative, conjectural.

Q. (By Mr. Hilger): In other words, you considered this estimate accurate, didn't you?

A. Whose testimony?

Q. The estimate of the amount of lumber put on that truck you considered to be accurate?

A. Yes, we assumed that it was. [381]

Q. All right. And the records of that would reflect, then, in your opinion, an accurate estimate of the lumber hauled away from that mill during September of 1953, wouldn't it? A. Yes.

Mr. Stark: I wish I was keen enough to follow this cross-examination.

Mr. Hilger: I wish you were, too, counsel.

Q. Now, you have stated that you had an exceptionally good dump at this mill?

A. We have.

Q. And an exceptionally good pond?

A. That is right.

Q. You had lots of clear water in it? You, I believe, commented on that in your testimony—lots of clear water; that you moved the logs out from the dump towards your mill?

A. Not continuously, no. But many times we did that, yes.

Q. But you stated, I believe, that you considered that pond to be superior, compared to other ponds around?

(Testimony of S. A. Peters.)

A. Yes, due to its size; a rather large pond for that community.

Q. It would have been relatively more easy, then, would it not, for you to keep your dump clear, than for some other mill to keep its dump clear, is that correct?

A. No, not necessarily. You take a pond on a river where there is running water, and deep, there is no trick at all; just pull them off, drop them in, they are boomed off. That is all there is to it. Here, as you dump logs, and keep dumping them time after time, and time after time, there is a backwash built [382] up that digs out in front of the dump and kicks up the dirt over here maybe a hundred feet, and when that gets in there then we have to clean the pond, because there is no way to get the logs over the top of it; just practically to the top of the water.

Q. And you did clean that?

A. Definitely. Just every time we could get in there we kept it clear.

Q. So that at all times it was in working order?

A. It wasn't cleaned every week, but most of the time was in working order, yes.

Q. Nothing, then, to prevent the clearing out of the log jams?

A. Well—oh, yes. When you get that filled up, and you get that pond plumb full of logs so you can't even move them around, how are you going to clear even the dirt out?

(Testimony of S. A. Peters.)

Q. I thought you said you had lots of open water in the pond.

A. Yes, most of the time, and especially October, we did that.

Q. Then, of course, that factor wouldn't come into play as one of the reasons why this dump was plugged, would it? A. Not at that time.

Q. Now then, to unload a load of logs in a dump such as yours, you first of all have a brow log that is parallel to the edge of the pond and sits right at the edge of it, is that correct?

A. No; the brow log at your dump can be any place.

Q. Well, at this particular place it was alongside the pond, was it not? A. That is right.

Q. And parallel to the edge?

A. Well, yes.

Q. And it had affixed in it a device to which you could [383] attach the eye on either end of the unloading strap, is that correct?

A. Your two straps were fastened underneath the brow log and possibly around it, and come up under the logs.

Q. On the other side of the truck. Well, to take everything in proper sequence, the truck drives in parallel to this brow log, does it not?

A. That is right.

Q. Right next to it. And right on the other side, then, of this truck is an A-frame on the side that is away from the brow log?

A. That is right.

(Testimony of S. A. Peters.)

Q. And that A-frame is equipped with a pulley?

A. That is right.

Q. And through that pulley is fed a line, one end of which attaches to a donkey engine, or other power unit, to reel it in and let it out, is that right?

A. Yes.

Q. And the other end, after going through the pulley, comes down and attaches to the unloading straps?

A. Right.

Q. Now, when a truck rolls in the unloading straps are usually already attached to the brow log, are they not?

A. Yes.

Q. From the last log?

A. They are fastened.

Q. They are fastened? All that is required, then, is that a worker pick up this steel cable—that is what an unloading strap is isn't it?

A. That is right.

Q. —and pass it through under the truck, between the reach that connects the front and back wheels of the truck, pass it [384] through between that reach and the load of logs underneath it?

A. That is right.

Q. And go around to the other side of the truck and engage the loop of the unloading strap in the hook that is on the end of the line that goes to the donkey, is that right?

A. Well, they generally just put the straps through from the side where the dump is—from the side where the motor is. He doesn't get around on the other side, where he has a chance to be squashed.

(Testimony of S. A. Peters.)

Q. He approaches the load, then, from the side where the power mechanism is?

A. That is right.

Q. He crawls under it and pulls the unloading straps through toward himself?

A. That is right.

Q. And then hooks them onto this hook that is on the end of the line going to the power mechanism?

A. That is right.

Q. All right. Then he take a strain on that line; he causes the power mechanism to reel in the line until the unloading straps are taut underneath load, is that correct?

A. That is right.

Q. Then the truck driver loosens the binders, usually, doesn't he, at that juncture?

A. Takes them off, yes.

Q. So this whole operation takes about, normally, anywhere from three to five minutes, is that correct—per truck load?

A. Well, it could take a little longer than that.

Q. It could, but ordinarily three to five [385] minutes?

A. Well, I would say at least five minutes.

Q. In five minutes you can unload the average truck?

Mr. Stark: I will say this: Now I know how to unload a truckload of logs.

Mr. Hilger: I make no comment on that.

Q. You say you bought logs from a number of places after October 21, 1953?

(Testimony of S. A. Peters.)

A. That is right; bought them any place we could get them.

Q. Bought some from Jim Plessas, did you not?

A. Not at that time.

Q. You had him perform some logging for you at \$28.00 a thousand, didn't you?

A. I think that was in '54; that wasn't in '53.

Q. I said after October 21st.

A. Yes. I didn't hear you; I am sorry.

Q. Then your testimony is that you did acquire some logs? A. Yes.

Q. And that was \$28.00 a thousand, wasn't it?

A. I couldn't remember the amount. I don't know what I paid him, now.

Q. Oh, I see. You would have to refer to your records for that, wouldn't you?

A. If you want an exact statement, yes.

Q. I see. Then you don't recall of your own knowledge just what you paid for logs and logging after October 21, 1953, do you?

A. To him? No, I don't remember just what it would [386] be.

Q. Do you know how much you paid to Ed DeBon for the timber you bought from him?

A. The timber I bought?

Q. Yes. A. How much?

Q. Yes. A. \$10,000.

Q. How much timber did you get?

A. About eight hundred thousand.

Q. It cost you about \$12.00 a thousand?

A. Somewhere around there.

(Testimony of S. A. Peters.)

Q. That was after December 21st—pardon me—after October 21, 1953, wasn't it? A. Yes.

Q. You bought logs from Walker after October 21, 1953, didn't you? A. Yes.

Mr. Goodwin: Just a moment.

Your Honor, I have hesitated to object about this line of questioning, but I feel now I am going to have to. Mr. Hilger wants, apparently, now, to develop these logging costs, when he objected to our testimony from this witness' memory of logging costs before. Now, if he is going to be allowed to open this up as to what we paid for timber and logging, then I submit that your Honor should permit us to let the witness to answer the question that was asked before as to any increased logging costs. On the basis of the Court's previous ruling, I am going to object to this line of questioning, on the basis it is not the best evidence, as Mr. Hilger has said.

Mr. Hilger: To save the Court from the necessity of [387] making that ruling, I will withdraw the question. I think I have covered my point.

Mr. Stark: Will you tell me what you have covered? I am just all at sea.

Mr. Hilger: Well, that is too bad.

Q. I have here these Lawrence Warehouse receipts which were introduced as Claimant's No. 3. It shows the deposit on various days of logs into a cold deck? A. That is right.

Q. Now, did you have any logs in the cold deck

(Testimony of S. A. Peters.)

that were not financed through Lawrence Warehouse? A. No.

Q. What was that? A. I did not.

Q. And this, then, would constitute all the logs that you had in cold deck?

A. That is right.

Q. How about the 500,000 that were delivered in 1952—I will correct that—the 500,000 that were left over from what was delivered in 1952? I believe the first date shown on this No. 3 here is July 2, 1953, is the date upon which logs were put into a cold deck? A. They are all in 1953.

Q. Yes.

A. Well, that is—Mr. Montgomery was still over from the 1952 deliveries? You said all of

Q. What happened to the 500,000 that was left scaling logs at that time.

your stuff was financed in Lawrence Warehouse.

Mr. Stark: I submit that assumes something not in evidence. He hasn't testified——

Mr. Hilger: This is cross-examination. [388]

Mr. Stark: Wait a minute, please.

He hasn't testified, nor has anybody else, that there was 500,000 feet left in the cold deck at the end of the winter season in 1952.

The Referee: I know, but didn't he say that the Lawrence Warehouse covered all that was in the cold deck?

Mr. Stark: Yes.

Mr. Goodwin: And he says this was all that was in the cold deck, your Honor, right there. I don't

(Testimony of S. A. Peters.)

know anything about any 500,000 feet the year before.

The Referee: I can only surmise, and if counsel knows of some other logs that were in that cold deck, that is another issue.

Mr. Stark: Let him ask the question, was there——

The Witness: You mean in this cold deck?

Q. (By Mr. Hilger): Yes.

A. No. That is all the logs that were in there.

Q. You had a cold deck out there, however, didn't you, from 1952?

A. We had a cold deck from logs that we couldn't use. They were in the pond, and a few on the bank, but not finished; just laying out there.

Q. You had other logs that weren't finished, some 500,000 feet?

A. Mr. Vander Jack put anywhere from a hundred and fifty to two hundred thousand feet I couldn't use, and that is part of those.

Q. I am talking about a cold deck of two million feet you had [389] from the fall of 1952, from which you took out a million and a half during the winter of 1952 and '53, Mr. Peters——

Mr. Stark: You understand this gentleman is not testifying, he is asking you questions, and if they are not the fact you are entitled to say it is not a fact.

Q. (By Mr. Hilger): And if it is the fact, you will so state, I am sure. Did you not build up a cold deck of two million feet in the fall of 1952?

(Testimony of S. A. Peters.)

A. We had some logs in '52, but how many I couldn't tell you. But they were certainly used up.

Q. Some of them were used up? At least some of them were used up?

A. Well, I say they were used up.

The Referee: That is all of them, is that right?

The Witness: Pardon?

The Referee: All of them?

A. Yes.

Q. (By Mr. Hilger): Do you know when they were used up?

A. I couldn't answer that; it would be through the winter months.

Mr. Hilger: Now then, I believe counsel has summarized the totals of the logs shown to have gone into the warehouse.

Have you got that figure, counsel, as to the total of the ones that went in, in the warehouse, by those receipts?

Mr. Goodwin: Yes, I can give you that. A million——

Mr. Hilger: There was an adding machine tape on here.

Mr. Goodwin: Yes; I threw the tape away. One million [390] two hundred sixty-eight thousand five hundred ten feet.

Mr. Stark: That is in evidence some place.

Mr. Hilger: It is not in evidence except through Exhibit 3.

Mr. Goodwin: Here it is; yes, here it is.

(Testimony of S. A. Peters.)

Q. (By Mr. Hilger): Now then, your counsel has indicated that the total of these logs going into the warehouse, per these receipts, is 1,268,510 feet. Would that be correct?

A. That is the tape that was run off those? Yes. that the first logs you took out were on December 9, 1953. I am looking now at the warehouse receipt dated September 9, 1953.

A. Let me see those other receipts—those other sheets—and we can get it exact; see if those totals are——

Q. I beg your pardon?

A. I say the totals shown here on releases would correspond, maybe a day after they were scaled and dated by the scale man.

Q. That is the precise point I am leading up to now. This warehouse receipt here, dated September 9th—and for the purpose of the record I shall have to identify that by number, because there are two of them bearing that date, No. 31219 and 31218—in each instance there appears in the portion that is the record of releases and balance on hand, a withdrawal on December 9, 1953, of the full amount in footage shown on the receipt. In other words, on 31219 you show receiving a hundred and eighteen thousand two hundred feet on September 9th, and on [391] December 9th of 1953 you show a withdrawal of a hundred and eighteen thousand two hundred feet.

A. All right. They were undoubtedly scaled out

(Testimony of S. A. Peters.)

with the bureau, and withdrawn, and we released them, paying the bank at that time.

Q. And a hundred eighteen thousand two hundred was scaled out as per this record of release, right? A. If that is correct, yes.

Q. And likewise, 31218 shows that the entire amount delivered of a hundred and twenty-six thousand one hundred eighty feet was likewise withdrawn in the same amount on December 9, 1953.

A. That is undoubtedly—that is the day they were released.

Q. All right. Now then, we will look at the next withdrawal you made. I am referring now to Warehouse Receipt No. 31217, a part of your Exhibit No. 3. It is dated August 21, 1953; shows that upon that date you received into the warehouse a hundred and ninety-six thousand one hundred feet of logs. Is that correct? A. That is right.

Q. And it shows that on February 10, 1954, you drew the exact same amount out.

A. Well, when you release a deck that size you pay for it all at once.

Q. Well, that is right, but that shows the amount that was released and taken out of the warehouse?

A. Sure. That was all there was on that warehouse receipt.

Q. All right. Now, if you will look at Warehouse Receipt No. 31216, also a part of your No. 3, that is dated August 21, 1953, [392] and shows that on that date you received a hundred and seventy

(Testimony of S. A. Peters.)

thousand sixty feet into the warehouse, is that correct? A. Yes.

Q. And it also shows that on February 11, 1954, you took out a hundred and seventy thousand sixty feet, the exact amount that went in? A. Yes.

Q. Now then, on Warehouse Receipt No. 31214, being a part of your Exhibit No. 3, dated July 2, 1953, it shows the receipt into the warehouse of 657,970 feet of logs? A. That is correct.

Q. Then, on April 6, 1954, there were 97,760 feet taken out, and that on April 6, 1954, there were an additional 74,190 taken out, and that on April 6, 1954, there was an additional 85,795 feet taken out. A. That is correct.

Q. And, according to this document, then there would be 127,710 feet remaining in the warehouse?

A. No. It was all lifted at one time.

Q. All paid for at once? A. Yes.

Q. So that, by actual deliveries recorded out of the warehouse you have received all but 127,710 feet of what went in there?

A. No; we received them all.

Q. You took those out?

A. As a rule we don't even keep these down here, because when you release a warehouse receipt you release it for the full amount, so you don't pay any attention to it.

Mr. Hilger: May I refer to the scale [393] tickets?

Q. Now, were these the documents used to obtain release of these logs from the warehouse?

(Testimony of S. A. Peters.)

A. Not completely.

Q. They weren't?

A. These represent all of the logs that are represented by those warehouse receipts. They are supposed to be a million two hundred and some odd thousand feet of logs. As the boys take them out, or as we needed them, they came up from the mill and scaled them out, and finally scaled them all out, and we boomed them off and paid for them.

Q. Now, these are the logs, however, that Mr. Barrett testified he scaled?

A. That is right—he or his men.

Q. That is right. Where does it show the brand on here? A. The brand?

Q. Yes. I am handing you the document.

A. I don't know. We didn't pay any attention to the brands.

Q. It doesn't show on there, does it?

A. That wouldn't make any difference. I bought logs.

Q. I just asked you whether it showed on there or not, Mr. Peters.

A. No. I never looked to see, and we don't pay any attention to brands.

Q. Well, a brand is the identifying mark on a log, isn't it? A. That is right.

Q. These have no relation, then, to the withdrawals that were made for the Lawrence Warehouse records?

A. Not completely, no, because these were probably all scaled out before we finished the release

(Testimony of S. A. Peters.)

over there, of paying the bank off. But I couldn't ask the scaling bureau men to come up [394] every day, or every other day, and scale just a few logs. That would have been expensive.

Q. Well, there are nine scaling records here, that is, each composed of a sheaf of several pages stapled together. This first one I show you was scaled on November 3, 1953, wasn't it?

A. That is right.

Q. The second one was scaled on November 5, 1953, wasn't it? A. No. Yes, that is right.

Q. The third one was scaled on November 10, '53? A. That is right.

Q. And this one was scaled on November 18, 1953? A. Yes.

Q. And this one was scaled on November 20, 1953? A. That is right.

Q. And this one was scaled on December 4, 1953? A. That is right.

Q. At that time you hadn't even taken anything out of this cold deck, had you?

A. Yes. We took out two batches on December 9th.

Q. The latest date I think I quoted to you was December 4, 1953.

The Referee: You mean the reference to this?

Mr. Hilger: I have reference to these scale tickets they have been bandying about today, but which are not yet in evidence.

Q. You had not at that time taken anything out of this cold [395] deck, is that your testimony now?

(Testimony of S. A. Peters.)

A. What do you mean, we hadn't taken anything out?

Q. This No. 3, composed of these Lawrence Warehouse receipts, you have testified covers every log you had in the cold deck at that time, is that correct?

A. Covered by these, yes.

Q. All right. Now then, you testified this morning that as they were taken out you had these documents prepared—these scale tickets?

A. No. These had to be prepared before we could take them out. We wouldn't dare cut up those logs that were property of banks or Lawrence Warehouse. These were up in the air, inside the pond. They were taken out and boomed off, and then we were free to release them as we pleased. We still hadn't used them; they were still in the pond.

Q. And at December 4, 1953, you hadn't got a single log released out of that warehouse, had you?

A. That is the first release.

Q. On December 9th?

A. Because they are down to the water doesn't make them not in the warehouse receipt. They are still under the receipt.

Q. You testified this morning as you took these out of the warehouse——

A. We paid for them.

Q. ——you had these scale tickets prepared?

A. I don't think so.

Mr. Goodwin: No, he didn't, your Honor. They

(Testimony of S. A. Peters.)

had the [396] logs cold-decked, and subject to this warehouse, that they would pull logs out of this, but put them in a special pocket boom. They were not technically in the deck—they were in the pond. But he had boomed them off, so they couldn't get commingled. He further testified that when they actually got ready to use those logs, they then released them from the warehouse, not from the cold deck. So Mr. Hilger has been repeatedly badgering the witness on that, and has repeatedly said how they operated, and it is abundantly clear——

Mr. Hilger: I want to find out what they did, because there is a wild discrepancy between these two pieces of records.

Mr. Goodwin: There is no discrepancy at all. You are talking about two different things.

Mr. Hilger: If your Honor will allow me to develop it, I can show the discrepancy.

Mr. Goodwin: Mr. Hilger is making a point of when these logs were released, according to the notations—released from the cold deck, from—pardon me, I have fallen into the error—released from the warehouse lien. These show when the logs were scaled—had nothing to do with the release of the warehouse sale. As Mr. Peters has explained, they would pull a bunch of these logs into a boom pocket and scale them—for example, the first one on November 3rd, pulled some of these logs out of the deck and into a pocket and scaled them—but still remained subject to this lien until Mr. Peters went in and paid for them. So they are entirely

(Testimony of S. A. Peters.)

two different things. [397] And the witness, as I understood him, testified to that several times. Mr. Hilger is badgering the witness and arguing with the witness.

Mr. Hilger: I want to make it completely clear now that counsel has told the witness just what did occur. I understood the witness' testimony.

Mr. Goodwin: I object to that, and I object to the statement made by Mr. Hilger. I don't think what I have said, your Honor, is anything different from what is already in the record.

Mr. Hilger: The record can speak for itself, and my recollection of it—and I have a right to test this witness' recollection on it—was that these scalings, totalling up the nine hundred thousand odd feet, were made when the logs were taken out of the cold deck, out of the warehouse, and put in the pond, and then they would be floated up for use in the mill. There was no mention made of them being put into a separate pocket where anybody could specifically identify them, and I think Mr. Barrett's testimony—a witness called by the Claimant—testified that he scaled these when they were taken out of a cold deck, and that some of them he scaled when they were in the pond and lying in and about the pond, and they had nothing to do——

Mr. Goodwin: Exactly.

Mr. Hilger: The point I am making is that these scalings here have nothing to do with the logs that were put into this warehouse; that the

(Testimony of S. A. Peters.)

proper accounting for the logs that went [398] into the warehouse is reflected on the receipts releasing them in the same amount in which they were put in. That is the object of my inquiry, and I think that there are a number of facts I can develop to show it. I have got a right to, if that be the case.

Mr. Stark: The error he falls into is so obvious, and it is this: that the warehouse receipt is issued in favor of the bank on the basis of a unit advanced to the sawmill for each foot of log that is in the cold deck, presumably, and when he goes to get release of these logs he can go to the bank and hand them any multiple of that unit in money, and the bank would mark down on that warehouse receipt the multiple of that money, as based on the unit, irrespective of what it was or whether the logs were even in existence or not; the bank would release to him whatever amounts of footage he paid for.

The Referee: He wouldn't represent to the bank that he had logs in this receipt that weren't there, would he?

Mr. Stark: No; he thought he did have.

Mr. Goodwin: He didn't know it at the time, your Honor. That is the point.

Mr. Hilger: Yes. But I also direct, or invite the Court's attention to the fact that these are accounted for in straight footages, not dollars, on these warehouse receipts, and it accounts for every-

(Testimony of S. A. Peters.)

thing that went in there in September, a hundred and twenty-seven thousand feet.

Mr. Goodwin: Your Honor, I don't want anyone, intentionally [399] or accidentally, to mislead the Court, but I am sure Mr. Hilger knows these logs are not scaled again by the warehouse, or anybody acting for the warehouse, when they come out of the deck. Just as Mr. Stark explained, you pay for them and take them out of the deck on the same basis they lend you the money in the first place, and if it hadn't have been for the fact that Mr. Peters, on his own volition, decided to make this second scale, there would never have been another scale.

Mr. Stark: In other words, if your Honor please, Mr. Peters could have gone into the bank the day after he borrowed this money and paid it all back, and the bank would have released on this warehouse receipt every foot that they had apparently loaned on. It would have absolutely nothing to do with how much footage was actually in the pond.

Mr. Hilger: Well, perhaps I can demonstrate why that is totally inapplicable to this situation. If I borrow a thousand dollars from the bank and give them certain security, if I pay them the thousand dollars, naturally I am entitled to full reconveyance of my security.

Mr. Stark: Right.

Mr. Hilger: But if I pay them \$250, I am entitled to a conveyance of only so much of that se-

(Testimony of S. A. Peters.)

curity as will leave the remaining balance of the security adequate to protect the bank.

Mr. Stark: Right.

Mr. Hilger: So that any time there is a partial release of logs in a warehouse—and we will introduce testimony, [400] inasmuch as this has become a point, from people who are experienced in the practice of it, and I may be able to get one of the Lawrence Warehouse people themselves down here tomorrow—these logs are counted when they go in and out of that warehouse.

Mr. Goodwin: And scaled, Mr. Hilger? Are you telling the Court they were scaled?

Mr. Hilger: I am telling you we will introduce our evidence.

Mr. Goodwin: Are you telling the Court they were scaled when they came out of the deck?

Mr. Hilger: I am telling you they should have been, if they weren't. The Lawrence Warehouse will be delighted to hear about it if they weren't.

Q. You have a warehouse manager, employed by your Lawrence Warehouse, one of your former employees before he took over the job?

A. Yes. I don't know whether he took the job with Lawrence Warehouse or not.

Q. I am talking about, you had a Lawrence warehousing manager there, did you not?

A. Yes.

Q. Without reference to any scaling?

A. Yes.

(Testimony of S. A. Peters.)

Mr. Stark: That is the A, B, C's of field warehousing.

The Witness: He is a field warehouseman, yes.

Q. (By Mr. Hilger): Let's get it into evidence. You had a warehousing manager from Lawrence Warehouse Company there? A. Yes. [401]

Q. And you had to satisfy him before you could obtain his certificate for a release of these logs, did you not? A. Yes.

Q. And he had to join with you in the signature? A. Yes.

Q. And he had to be satisfied that this was the proper amount of logs for him to say were released, isn't that correct? A. That is right.

Mr. Margolis: Let's get an answer for the record.

The Referee: He says that is right, that is correct.

Mr. Margolis: I couldn't hear it very well, your Honor.

Q. (By Mr. Hilger): And without such a release and verification as to quantity, you could not obtain a release from a warehouse receipt, could you? A. No.

Q. And you couldn't go down to the bank and get your release without his signature, could you?

A. No, not unless I paid the whole thing off.

Q. That is correct. Now then, when these logs were taken into the warehouse, this warehouseman had to be satisfied as to their quantity, didn't he? A. Correct.

(Testimony of S. A. Peters.)

Q. That the quantity that he receipted for he actually received, didn't he?

A. That is right.

Q. Now, who was your warehouse manager there during the early part of the summer of 1953 and precisely up until August 21st of 1953?

A. Mr. O'Rourke.

Q. Harry O'Rourke of Crescent City? And subsequent to that [402] who was your warehouse manager? A. A Mr. Greene.

Q. Mr. Greene is also your mill superintendent, or was at that time, wasn't he?

A. That is right.

Q. And Mr. O'Rourke at that time was also you mill superintendent, wasn't he?

A. That is right.

Q. And both of them satisfied themselves that this amount of logs went into that warehouse, didn't they? They signed their names that they did, is that correct? A. Correct.

Q. And they satisfied themselves that this amount came out, or they wouldn't give a release, isn't that correct? They did sign the release, didn't they?

Mr. Stark: They released whenever the bank told them to release.

A. That is right. As I recall, they don't sign the releases.

Q. (By Mr. Hilger): The bank releases when the warehouseman certifies?

(Testimony of S. A. Peters.)

A. No. It co-signs the release, stating "Received," so many logs.

Q. To state it another way, the bank releases 196,000 feet of logs, is that correct?

A. When I pay them for them, yes.

Q. That is right, when you pay them for them. And your warehouse manager has to satisfy himself that is what went on on that release?

A. Right.

Q. And at both times your warehouse manager—the Lawrence Warehouse manager, who also happened to be your mill superintendent in each instance—satisfied himself in both of those [403] respects, did he not? A. That is right.

Q. And these scale tickets that Mr. Barrett has caused to be made have no relation to these warehouse, either receipts or releases? They were an independent scaling that he did all on his own at your request? A. That is right.

Q. And they were not done for the purposes of the Lawrence Warehouse, or anyone else?

A. That is right.

Q. And they included logs, and accumulations of logs, in the mill pond, I believe you heard Mr. Barrett testify, is that correct?

A. Well, these were taken down. They went into the boom sticks, or the boom that held the other logs. They are all under this warehouse receipt going over into the boom; had nothing to do with any new logs that were coming in. The fact is, I don't think we had very many coming in at that

(Testimony of S. A. Peters.)

particular time, but even those were scaled. We had the right to pay for them as we pleased, but had to satisfy the warehouseman that when we took out a certain batch, that is what we took out.

Q. That is right. You had to satisfy them as to amount?

A. We didn't take out two hundred fifty and pay for a hundred and fifty; you paid for two hundred and fifty.

Q. That is right. You had to satisfy them as to the amount that was coming out of there?

A. We run that, Mr. Hilger—that special——

Q. That is Mr. Barrett's scale you are talking about?

A. That is right. We ran that over for our own benefit, [404] because we felt that those logs were over-scaled in the pond, and that is what we found did actually happen. We did it for our own good, and to know just what the picture was. We felt that we paid for more logs than we got, but that didn't make a bit of difference to the bank. I borrowed on them and had to pay for them.

Q. How did you account to the bank for the difference? A. I paid them in full.

Q. When you discovered there was only 900,000 in there instead of 1,200,000, did you go down and get 300,000 releases? A. Did I?

Q. Yes.

A. They had probably already been paid for.

Q. Where on here do you account for release of some 300,000 logs?

(Testimony of S. A. Peters.)

A. It probably wasn't even just marked down. As a rule, we don't even keep these marked out. We don't ever mark these out unless we please. That is a bookkeeping entry.

Q. You are aware that the warehouse manager for Lawrence has to post all of these?

A. He has to, but we don't have to, Mr. Hilger.

Mr. Stark: This is a duplicate.

The Witness: That is just our duplicate; has no bearing.

Q. (By Mr. Hilger): It is a true copy, isn't it?

A. This is a true copy. The releases are just what is put down. If they weren't put down, that doesn't mean a thing. We [405] have got the releases. We have paid for it.

Q. Are you submitting to this Court that this is a true copy of these warehouse receipts?

Mr. Stark: What is that?

Q. (By Mr. Hilger): Are you submitting to this Court that these warehouse receipts are a true copy of the warehouse receipts?

Mr. Stark: He just said——

Mr. Hilger: They are not a true copy.

Mr. Stark: ——the release part is not necessarily; and that is a duplicate of the customer's copy of the warehouse receipt. There is no burden on him to mark down releases.

Mr. Hilger: Well, I have asked him if he did deliver these specific quantities that are mentioned herein, and he said he has; that these are correct in each instance, and it does, in fact, account for

(Testimony of S. A. Peters.)

all except 127,710 feet that is accounted for by postings of releases.

The Witness: We paid for them.

Q. (By Mr. Hilger): Are you suggesting that this record is incomplete, and that 127,000 is also accounted for?

A. I am not saying it is incomplete. You are asking me if the top part is correct. The top part is correct. That is what we borrowed money on. That is what is supposed to have gone in the deck. What we release down below may not even have been put down. It doesn't make a bit of difference.

The Referee: It is put down? [406]

The Witness: A few of them are, on some of the full deals, but there is one he is talking about, your Honor, that I haven't carried out the last time the amount was released.

The Referee: Who put these figures on here?

A. Those are our office's figures down there.

Q. (By Mr. Hilger): Those are put down by your office? A. Sure.

Q. At or about the time the transaction occurred, aren't they?

A. But that doesn't mean anything. That is just a bookkeeping entry for ourselves.

Q. Don't you strive to make your bookkeeping entries accurate?

A. They are in the books. This has no bearing on it. Our payments are shown in the books. Our payroll or cash disbursement records.

Mr. Stark: Mr. Hilger, are you trying to show

(Testimony of S. A. Peters.)

from this witness that the scaling by this co-operative Northern California——

Q. What do you call them?

A. Northern California Log Scaling and Grading Bureau.

Mr. Stark: ——has been falsified for some reason?

Mr. Hilger: I will say that it is obvious from the testimony here that the scale prepared by the Northern California Log Scaling Bureau in November of '53, from the testimony of the scaler and the testimony of this witness, bears no relation to this Lawrence cold deck. And that, of course, is a conclusion for the judge to make.

Mr. Stark: I will tell you what is obvious, Mr. Hilger, [407] and that is this: that either your—I won't call him your client, but this person that you now represent as the successor—either did or did not deliver three hundred some odd thousand too few logs at his scaler's scale and charges for them——

Mr. Hilger: That, I appreciate, is what you are trying to prove, but your proof doesn't stand up.

Mr. Stark: All your questions are accusatory, but the answers are not.

Mr. Hilger: We will let the judge decide on the evidence, and I would request the judge that I be allowed to proceed with my cross-examination without further interruptions of an irrelevant nature.

Mr. Stark: If you get into a field that I consider——

(Testimony of S. A. Peters.)

The Referee: Ask your questions, and if there is any objections we will rule on them.

Q. (By Mr. Hilger): Now, these figures that show on this No. 3, you have stated—I don't know whether it was in response to a question, but I will now give you an opportunity to make it responsive—you stated that those figures on the record of releases and balance on hand portion of your Exhibit No. 3 were put there by you, or your office, is that correct?

A. These through here, yes. Those are undoubtedly the dates they were released.

The Referee: That is referring to the figures on the lower part of the warehouse receipts?

A. Yes.

Mr. Hilger: That is correct. [408]

Q. And those figures were, or at least tried to be, a true copy of the entries made by the warehouse manager, as to the number of logs going out of the warehouse? A. Yes.

Q. And that applies only to logs that were put up into a dry cold deck? All these logs were put into a dry cold deck?

A. That would be under the water—quite a few of them under the water inside the pond.

Q. Originally were they not all stored in a dry cold deck? A. No.

Q. They were stored where?

A. Stored inside the pond so a portion of the logs would be under water. Part of them would be up in the air.

(Testimony of S. A. Peters.)

Q. (By Mr. Goodwin): You cold decked in the pond, is that what you mean?

A. That is right, cold decked right in the pond. You might have eight or ten feet of logs under water.

Q. (By Mr. Stark): Let me ask a question: Do firs sink in the pond?

A. Yes. You get enough of them started and they will sink. You can hold them down, and then we have to strap them a little bit to keep them in shape and keep them straightened out.

Q. (By Mr. Hilger): Strap ten of them together, and six will be under water.

Now, in arriving at these figures that were put down here for the amount of the release, some sort of a paper was created, was it not, so that the warehouse manager would know what to put [409] down?

A. They would be scaled out of the pond, or out of this deck, or out of the boomed-off circle. There would be a certain amount would come out of there. And he would know that was what we were going to release.

Q. Could I see those scale records?

A. We don't have them. This is all paid for.

Mr. Hilger: That is all.

Mr. Stark: May I ask a couple of rebuttal questions?

The Referee: Sure.

(Testimony of S. A. Peters.)

Redirect Examination

By Mr. Clark:

Q. The Lawrence Warehouse Company receipts the blue sheet that I am showing you, and the footage that appears on the total of those represents the amount of footage that you borrowed money on from your bank, is that correct?

A. You mean the total that is shown up there on the top part?

Q. Yes. A. That is right.

Q. That was the amount of footage you borrowed money on, and the Northern California Log Scaling and Grading Bureau is a scaler of the logs by footage that was actually in the pond at the time that the scaling took place?

A. In this particular deck, yes.

Q. That is right. Now then, the difference between those two figures—the total that was scaled, one, that is the first item, the total that was scaled, and the total footage that you borrowed money from the bank on the warehouse receipts—what was the difference in footage?

A. Approximately [410] 300,000 feet.

Mr. Stark: Your Honor, do you want a recess?

The Referee: Yes; ten minutes recess.

(Recess.)

The Referee: We will resume the case.

Mr. Margolis: I observe, may it please your Honor, that there are people in the courtroom, and

(Testimony of S. A. Peters.)

if they are to be called as witnesses here we would like an order asking they be excluded at this time.

Mr. Stark: You mean put under the rule?

Mr. Margolis: Yes.

Mr. Stark: We have no objection.

Mr. Margolis: Are there any witnesses?

Mr. Goodwin: Yes, three witnesses here.

Mr. Margolis: Not Mr. Peters; he is an interested party.

The Referee: May all persons who are to be witnesses that haven't already testified retire from the courtroom, unless they are parties?

Mr. Goodwin: Well, we are going to call one of them right now, your Honor.

Mr. Hilger: I am not finished with cross-examination, yet.

Mr. Stark: We were led to believe you were.

Mr. Hilger: I believe there was some redirect examination that went on in here. I would like to continue with further cross-examination, if I may. I have some questions. [411]

The Referee: I want to ask the witness some questions, anyway, when you get through.

Mr. Goodwin: Do you want these witnesses out of the room?

The Referee: Yes.

Mr. Goodwin: Would you gentlemen retire?

(Whereupon the witness S. A. Peters resumed the witness stand.)

The Referee: Proceed, Mr. Hilger.

(Testimony of S. A. Peters.)

Recross-Examination

By Mr. Hilger:

Q. Now then, you recall calling, or having called Mr. Barrett, who performed this scaling in November and early December, do you not?

A. Yes.

Q. And he was called as your witness, I believe?

A. Yes.

Q. Do you recall in his testimony—I am reading from page 257 of the transcript, under questioning by Mr. Goodwin:

“Q. Now, in late 1953 was your bureau requested to scale some logs for Timber, Inc.? A. Yes.

“Q. And what were the logs? Were they coming out of a cold deck at the mill?

“A. Well, we were requested to scale the logs that were in the pond at that time.”

Do you recall that testimony?

A. Well, he probably referred to in the pond. They were in the pond—I mean, they were decked in the pond, but they were up in the air. [412]

Q. Is that a correct statement of what he was requested to do, to scale the logs in the pond?

A. No. He was to scale this deck, represented by these warehouse receipts. That may be just a misstatement.

Q. That is what I want to find out. Is that a correct statement?

A. He knew what he meant, but it doesn't sound the same as you read it back.

(Testimony of S. A. Peters.)

Q. Well, I just want to know if that was a correct evaluation of his instructions?

A. He scaled the logs out of the deck.

The Referee: What he wants to know is whether the way the witness testified was the instructions that were given him by you or your representative.

A. Yes, we asked him, your Honor, to go up there and scale the logs.

The Referee: I understand.

Read what he said.

Q. (By Mr. Hilger): In answer to the direct question, "Were they coming out of a cold deck at the mill?" he answered, "Well, we were requested to scale the logs that were in the pond at that time."

The Referee: Was that what the request was?

A. They would have to be in the pond, your Honor, before they can scale them.

Q. (By Mr. Stark): You misunderstand what the judge wants to know, Mr. Peters. It is whether or not the scaler was asked to scale the logs in the cold deck, or asked to scale all of the [413] logs in the pond, whether in the cold deck or not.

Mr. Hilger: That is not specifically the question.

Mr. Stark: Is that your question, Judge?

The Referee: I want him to answer the question that was asked him by the attorney representing the Trustee.

Read the question.

(Record read by the reporter.)

The Referee: Now, is that what the request was?

(Testimony of S. A. Peters.)

A. No; the request we asked the bureau to do was to scale all the logs in this deck. They had to be torn down before they could scale them, so they would be in free water, or open water, at the time they were scaled.

Q. (By Mr. Hilger): Now then, that was all done before this chap had a chance to scale them, was it not—all this tearing down and breaking down?

A. No. We only tear down a few at a time. That is the reason for so many different days he was up there. He couldn't scale them all. They would be jammed in there tight.

Q. All right. Now then, when they were taken out of the cold deck, or broken down, you say, and put into the pond, they were just in the pond with the rest of the logs, were they not?

A. Oh, no, they were inside the boom-sticks. What few might have been there would have no bearing on what came out of that deck. They were kept separate.

Q. "Can you say more specifically"—I am still reading from page 257—"about when it was you were doing this scaling? [414]"

"A. To the best of my knowledge, your Honor, it was during the winter months, the last part of 1953, or the first few months of 1954. We scaled the logs in the pond over a period of once or twice a week for a period, if I recall correctly, a period of two or three months."

(Testimony of S. A. Peters.)

Now, is that a correct statement of what this scaler did?

A. No. I think they scaled them less times than that.

Q. Looking at the bottom of page 258, questioning by Mr. Goodwin:

“Do you remember about how many logs you scaled on this project?”

A. As I say, I did it several times, personally. I did it three or four times, and scaled probably 600,000 feet, and our check scaler for the industry did it several times. I would estimate his to be the same, or a little less. Probably the total was a little over a million feet of logs actually scaled.”

Now, is that an accurate statement of what he did? A. Yes, except for the amount.

Q. You don't feel that he estimated the correct amount?

A. Not in his statement there, no. Of course, he couldn't remember without going back over his records exactly what the footage would be.

Mr. Stark: He didn't miss it but by about 25,000 feet.

The Witness: No. You said a million? [415]

Q. (By Mr. Hilger): A little over a million.

A. Well, almost, should have been in the deck—should have been almost a million three.

Q. (By Mr. Stark): I don't understand that to be so, Mr. Peters; I don't understand that to be so. What I understand the status to be, as far as you are concerned, is that Vander Jack said he delivered

(Testimony of S. A. Peters.)

a million two plus, but that in actuality at the scaling time there was nine hundred and seventy-five thousand.

A. That is what I said. There was supposed to be more, but weren't there.

Q. If they weren't there he couldn't have scaled them? A. No; that is right.

Mr. Hilger: Who is testifying?

Mr. Stark: Well, if you will excuse the jury I will testify. I don't have any qualms, counsel, about testifying before the judge, because I know that if he doesn't like what I say he will disregard it.

Q. (By Mr. Hilger): Now then, reading from page 268, at approximately the middle—well, I will begin at the top:

“Q. Did you scale the pond and deck?

“A. We scaled the logs in the pond. A lot of the logs were scaled. We scaled everything in the pond one week that we would be in, but not out of the deck. We would get those the next week, yes.”

Now, is that a correct statement of what he did—scaled them after they were released into the pond out of the deck? [416]

A. As I said, they had to be put in the open water before they could be scaled.

Q. It is a fact, then, that they had to be taken from the deck and put in the pond and mixed up with the others, isn't it? A. No.

Q. Well, maybe we can clarify that.

The Referee: What was his answer?

The Witness: No.

(Testimony of S. A. Peters.)

The Referee: No, not your answer; the answer of the witness.

Mr. Hilger: I asked, "Did you scale the pond and deck?" The answer was, "We scaled the logs in the pond. A lot of the logs were scaled. We scaled everything in the pond one week that we would be in, but not out of the deck. We would get those the next week, yes." In other words, he would not get any of them until they were released out of the cold deck into the pond.

Mr. Goodwin: There is no argument about that, your Honor. As Mr. Peters has testified, they took the logs out of the deck. The deck, itself, first was in the pond. They would pull some logs off of the deck and put them in a pocket so the man would scale them.

The Referee: That isn't what the witness said.

Mr. Hilger: That is precisely not what this witness, Mr. Barrett, said.

Mr. Goodwin: Yes, it is. [417]

The Referee: No. He said they scaled everything that was in the pond.

Mr. Goodwin: Here is what he said, your Honor—I want to discuss that a moment, if I can. The question was, "Did you scale the pond and deck?"

The Referee: Yes.

Mr. Goodwin: Yes, "We scaled the logs in the pond."—The logs in the pond—"A lot of the logs were scaled. We scaled everything in the pond one week that we would be in,"—meaning in the pocket, but not——

(Testimony of S. A. Peters.)

The Referee: You are reading something in there that isn't there.

Mr. Goodwin: Well, he goes on to say, "but not out of the deck." What he was trying to say, you can't scale a log while it is in the deck. It can't be done.

The Referee: The testimony is there, and the Court will have to look at it.

Mr. Stark: Not only that, but Mr. Peters can't impeach this witness by saying——

Mr. Hilger: I am not asking him to impeach him.

Mr. Stark: What are you asking him? You are trying to make out what this witness said when on the stand is not correct, through the medium of asking the present witness, Mr. Peters, whether it is or not.

The Referee: How did you get that rule?

Mr. Stark: He can't impeach the witness by asking Mr. [418] Peters——

Mr. Hilger: I am trying to impeach the testimony by his own testimony.

Mr. Stark: You are not reading from Mr. Peters' testimony.

Q. (By Mr. Hilger): You have heard this question and answer. Is that a correct statement of the procedure followed, or do you know what procedure Mr. Barrett followed? A. Certainly I do.

Q. Is that a correct statement of the procedure he followed? Yes or no.

(Testimony of S. A. Peters.)

A. In words, it isn't just exactly what he means.

Q. I don't want to know that; I want to know the answer to the question, is that an accurate description of what he did? Answer yes or no.

Mr. Stark: Answer yes or no, then explain it. You are entitled to explain it.

A. He had to scale the logs after they were taken out of the deck. He had to scale them in the water that were into the pocket that we held for those logs. Now, when he says these other logs—read that one sentence about something being scaled.

Q. (By Mr. Hilger): "We scaled the logs in the pond. A lot of the logs were scaled. We scaled everything in the pond one week that we would be in, but not out of the deck."

Now, yes or no, is that what he did? [419]

A. No, he did not scale any logs outside of this particular pocket and the deck. That is all he scaled, is the logs that are represented by these warehouse receipts.

Q. In other words, you feel that Mr. Barrett is inaccurate in his testimony in that respect?

A. You are trying to read into this that he scaled all the logs into the deck, or all the logs in the pond, which he didn't.

Q. I want to know—yes or no—is Mr. Barrett inaccurate in his testimony of what he did?

A. He is not inaccurate as to what he did. I would say he is inaccurate in what he said.

Q. He was inaccurate in what he said he did?

(Testimony of S. A. Peters.)

A. Well, he knew what he meant, and we know what he meant.

Q. That makes two of you. Did you actually observe Mr. Barrett doing this?

A. Yes. I was up there several times while they were doing it.

Q. But not all the time?

A. No; but the warehouse man was up there.

Q. Who is the warehouse man?

A. Mr. Greene.

Q. The one that certified that he received all of these logs in there?

A. No; that was Mr. O'Rourke.

Q. Why, I think he left you long before these logs were received, didn't he?

A. That is right. But the other man had to sign for them, that they were there.

Q. They were certified, and you or your accountant certified that you had received all these [420] logs?

A. Lawrence Warehouse certified they were there, that is right.

Q. And you certified to Lawrence they were there, didn't you?

A. Well, we borrowed the money on them. We had to.

Q. And, in connection with that, you had to certify you had those logs there?

A. Sure, or we couldn't have borrowed money on them.

Q. Presumably, according to your testimony, you

(Testimony of S. A. Peters.)

found out in December, possibly, that was incorrect. Did you notify Lawrence Warehouse?

A. No. Why should we? We were going to pay it.

Q. You didn't notify them?

A. We didn't know it at the time, until they were all through being scaled.

Q. All right. Further questioning on page 268:

"Do you know anybody other than Walker Logging Company who made any deliveries in there to the Peters mill?

"A. No, I don't. The biggest percentage of logs at that time were not branded. Walker's logs always were branded."

Is that a correct statement; the majority of logs were not branded?

Mr. Stark: Just a moment, please.

If your Honor please, this witness was released by counsel as being finished with him. We cross-examined on the question of those warehouse receipts and the scaling done by the organization, and period. [421]

Mr. Hilger: Well, scaling is exactly what I am going into.

Mr. Stark: It is not proper redirect examination.

Mr. Hilger: It is recross, your Honor.

Mr. Stark: I mean recross. There must be an end some time.

Mr. Goodwin: On the redirect examination Mr. Stark asked one question, and that was our redirect. Now, we are opening up the whole barn gate again,

(Testimony of S. A. Peters.)

to go all back over the testimony. I submit it is entirely inappropriate.

The Referee: The Court is willing to sit here and listen to him.

Q. (By Mr. Hilger): Is that a correct statement—the biggest percentage of logs in the pond at that time—this being November-December of 1953, and January, '54—the biggest percentages were not branded?

A. I don't think Mr. Vander Jack branded any of his logs.

Q. I want to know, yes or no, whether the biggest majority of them were unbranded.

A. They must have been, because we didn't buy from anybody besides Mr. Vander Jack until after October 21st.

Q. And you would say that the——

A. So all these logs in the deck were his logs, and they probably——

Q. Were unbranded, or branded?

A. Unbranded.

Q. Unbranded?

A. I don't think he branded his that [422] came to us.

Q. You don't know that?

A. No, I wouldn't swear to it, but I don't believe they were.

Q. Then you don't know whether Mr. Barrett's testimony, when he says the biggest percentage of them were not branded, you wouldn't know, then, whether or not that is correct, anyway, would you,

(Testimony of S. A. Peters.)

since you don't know whether Mr. Vander Jack branded his?

A. I don't recall at this time whether they were branded or not.

Q. Then your answer to this question is you don't know regarding the brand?

A. That is right. I don't know.

Q. Now then, when did you first make your complaint to Mr. Vander Jack that he was 300,000 feet short, if ever?

A. I never made any complaint to him that I was 300,000 feet short. What good would it do?

Mr. Hilger: That is all.

The Referee: You testified in the early part of your testimony about watching the trucks of Mr. Vander Jack going to Arcata? A. Yes, sir.

Q. Just how close were you to those trucks?

A. Go right by them, your Honor; sometimes have to pull out to one side of the road for them to go by.

Q. Did you ever stop them and measure them?

A. No. It wasn't my place to argue with his truck drivers.

Q. Did you ever say anything to him immediately after that? [423] A. Yes, I have.

Q. How soon after that?

A. Oh, I would say that on an average we would have three or four discussions a month over the logs, but it never brought me anything.

Q. How long did that go on?

A. Well, just about the time the trouble started

(Testimony of S. A. Peters.)

along in—it must have been along about the first part of July, your Honor—1953. Maybe it was the first of August. Maybe it was; instead of the first of July it might have been the first of August. The logs were going to town during that time and, come to think about it, your Honor, I think that I did in July—I think it was in July that I rode to town with him the first time.

Q. Did you put anything in writing?

A. I am not sure whether I did at that time or not; seem like I did, but I won't—

Q. When was the first time you put anything in writing with reference to it?

Mr. Goodwin: With reference to the quality of the logs, your Honor?

The Referee: With reference to delivering the logs to Arcata and not to his mill.

Mr. Goodwin: There is something in the record on that. If I could see the list of exhibits I think I can answer that, or find that for your Honor. There is a letter that Mr. Hilger introduced, if I remember right.

The Referee: You don't mean today, do [424] you?

Mr. Goodwin: No, I don't think so.

The Referee: The earliest one I have here is a reply of yours to the letter of November 11th of Mathews & Traverse.

Mr. Goodwin: Maybe it isn't in evidence. If your Honor wants to go on, I will look and see if I can find it.

(Testimony of S. A. Peters.)

The Referee: Very well. I haven't any further questions. That will satisfy me.

The Witness: I do have it in writing, your Honor, but I wouldn't want to tell you the exact date of it.

Mr. Goodwin: Thank you, Mr. Peters.

The Referee: Is that all, gentlemen, of this witness?

Mr. Hilger: That is all.

Mr. Goodwin: That is all I have.

The Referee: Very well.

(Witness excused.)

The Referee: Call your next witness.

Mr. Goodwin: Very well, your Honor.

Mr. Greene.

TED R. GREENE

called as a witness for the Respondents; sworn.

The Referee: Your full name is what?

A. Ted R. Greene.

Q. Ted R. Greene, is that right? A. Yes.

Q. Is there an "e" on the end, or otherwise?

A. That is correct. [425]

Direct Examination

By Mr. Goodwin:

Q. Where do you reside, Mr. Greene?

A. At Redwood Creek, Humboldt County.

Q. Is that the location of the Timber, Inc., saw-mill? A. That is true.

(Testimony of Ted R. Greene.)

Q. What is your business or occupation?

A. I am a mill superintendent.

Q. By whom are you employed?

A. Timber, Inc., of California.

Q. How long have you been so employed?

A. Oh, approximately three and a half years.

Q. And how long have you been in the sawmill business—connected with the sawmill business?

A. Thirty-five or thirty-six years, in there.

Q. Are you familiar with gang mills?

A. Yes, sir.

Q. Are you familiar with gang logs?

A. Yes, sir.

Q. This mill that you superintend is a gang mill, is that right? A. Correct.

Q. Now, when did you take over the duties of superintendent of the mill?

A. If I remember correctly, it was in August of '53.

Q. August, 1953. And at that time, Mr. Greene, who was delivering the logs to the mill?

A. Snow Camp Logging. [426]

Q. That is the Vander Jack operation?

A. Right.

Q. Were you regularly employed at the mill regularly and daily after that date?

A. That is true.

Q. Did you have an opportunity to examine the quality of the logs that were there and being delivered there? A. Yes, sir.

Q. What was the quality of those logs?

(Testimony of Ted R. Greene.)

Mr. Hilger: I will object to that on the same basis we objected to any testimony in this respect by Mr. Barrett. The contract called for Timber, Inc., to accept any logs that were less than 40 per cent defective, and quality is explicitly not mentioned except for that one item, and I believe your Honor has already ruled on the relevancy of going into this quality aspect.

The Referee: Well, I have, but I think he can testify as to whether these logs met the requirement.

Mr. Hilger: Whether or not they were more than 60 per cent sound, he can testify to. But the quality in general, I would object to it.

The Referee: You are right; the objection is sustained to the general question.

Q. (By Mr. Goodwin): Did you observe the logging trucks of Vander Jack following your employment there? A. That is true.

Q. Both those that delivered logs to the sawmill and those that delivered logs to town?

A. That is true. [427]

Q. Were any gang logs being delivered to town by Vander Jack after your employment?

A. Yes, sir.

Q. Was there any difference in the general quality of those and the quality of the logs delivered to the mill? A. Yes.

Mr. Hilger: Same objection. I move it be stricken.

The Referee: It may go out. Objection sustained.

(Testimony of Ted R. Greene.)

Q. (By Mr. Goodwin): How long did Mr. Vander Jack deliver logs to the Timber, Inc., mill?

A. That certain date they quit, I couldn't say that; I don't remember that date.

Q. Do you remember about when it was, approximately? A. I would say in October.

Q. Of 1953? A. Yes, 1953.

Q. Sometime in October of 1953, he discontinued delivering logs? A. Yes.

Q. Prior to that time had Timber, Inc., put a check scaler in at the dump, Mr. Greene?

A. That is true.

Q. And this check scaler was checking the scale on the logs? A. Yes.

Q. For Timber, Inc.? A. Yes.

Q. His wages were paid by Timber, Inc., is that correct, sir? A. Yes, that is true.

Q. On or about the time that the deliveries were discontinued did you have a conversation with Mr. Vander Jack wherein you told him that you would pay \$28.00 for logs? A. I did not. [428]

Q. Did you have any conversation wherein you told him that you would pay any particular amount for logs?

A. No price was ever set, and I never made no such statement.

Q. Did you ever tell Mr. Vander Jack, on or about that time, or before or after that time, that the mill would not accept any further delivery of logs that were scaled by Merle Montgomery?

A. Never.

(Testimony of Ted R. Greene.)

Q. Now, Mr. Greene, after the time that you were there you had occasion regularly to observe the operation of the log dump? A. That is true.

Q. Was the log dump jammed or plugged on occasion? A. That is true.

Q. You had been familiar with sawmills and log dumps for 35 years? A. That is true.

Q. Was this log dump jammed any more than average or normal?

A. Not than the average of other ponds.

Q. You say not more than the average of other ponds? A. Of other ponds.

Cross-Examination

By Mr. Hilger:

Q. You did have a conversation with Mr. Vander Jack on or about October 21, 1953, however, did you not?

A. I had no conversation with Mr. Vander Jack at all.

Q. At any time?

A. No, sir. Mr. Vander Jack is the one that had the conversation with me.

Q. Oh. What was the occasion for that conversation, Mr. Greene?

A. Mr. Vander Jack was very angry. [429]

Q. What was he angry about?

A. He was angry about us putting in a check scaler.

Q. Was he also angry at the instructions you had

(Testimony of Ted R. Greene.)

given the check scaler not to give him a delivery receipt—not to give Vander Jack a delivery receipt?

A. What he was angry about concerning that I do not know, but he did not want no check scaler.

Q. He didn't call you and object to that check scaler until October 21st, the date that deliveries ceased?

A. I don't remember the day exactly, but he had been around there frequently.

Q. And he didn't call you or talk to you, though, until the very last day the deliveries were made, isn't that right?

A. He didn't talk to me; he talked to his log scaler and told him to scale his logs down the road.

Q. I thought you said he talked to you and was very angry?

A. He was angry.

Q. Well, now, you say now he didn't talk to you. I am talking about the time you mentioned that he talked to you. That was the day—on or about the day—that deliveries from Snow Camp ceased, wasn't it?

A. In that neighborhood.

Q. By "In that neighborhood," do you mean within a month, within a week, within a day, or within an hour?

A. Well, I couldn't tell it quite within the hour or the day.

Q. But it would have been within one day, give or take?

A. That is true. [430]

Q. How long had that check scaler been there at that time?

(Testimony of Ted R. Greene.)

A. Oh, approximately a week, somewheres in that neighborhood.

Q. He had been check scaling for a week or more? A. Yes.

Q. That was the first time Mr. Vander Jack mentioned this to you, was the day the deliveries ceased?

A. That is right.

Q. Are you sure that check scaler hadn't been there for three weeks? A. I wouldn't say.

Q. He could have been there a month, couldn't he?

A. No, I don't think he was there a month at all.

Q. Now, how long are you sure he had been there? A. That is quite a little time back.

Q. What?

A. That is quite a little time back. I couldn't tell you without going back to the time book and tell you the day.

Q. But it had been sometime previous to the date that Vander Jack quit delivering logs there?

A. He had been there before Vander Jack quit delivering logs.

Q. For some few weeks, hadn't he?

A. How many few weeks; it was not a month.

Q. Not a month? A. No.

Q. But more than a week?

A. He could possibly have been there more than a week.

Q. Could be three weeks, couldn't it?

A. I don't think he was there three weeks.

Q. How long do you think he was there?

(Testimony of Ted R. Greene.)

A. I would say a [431] week, ten days, in that neighborhood.

Q. This is the first time that Mr. Vander Jack had called you in relation to that check scaler, the day that deliveries ceased, was that not right?

A. That is right.

Q. That is the same day Virgil Ray tried to deliver some logs there, isn't it?

A. I don't know Virgil Ray.

Q. You do recall the load that arrived, though, the morning of the 21st, and had some difficulty getting its logs dumped?

A. There has never been a load of logs refused at that dump.

Q. That is not responsive to the question. I say you do recall that that morning a Vander Jack truck arrived with a load of logs and had difficulty persuading the dump man to unload him. You recall that load, do you not? Quite a commotion made about it?

A. As far as ever refusing to dump a load of logs——

The Referee: That isn't the question.

Read the question to him.

(Question read by the reporter.)

A. No, sir.

Q. (By Mr. Hilger): You don't recall it at all?

A. No, sir.

Q. It was that same day that Mr. Vander Jack had a conversation with you. Does that refresh your recollection a little? That very morning.

(Testimony of Ted R. Greene.)

A. With regards to the scaler.

Q. It was that same day? Now, do you recall the load of logs [432] I am talking about?

A. No, sir.

Q. Were you at the mill that day?

A. Yes, sir, I was at the mill that day.

Q. What did you think when the Vander Jack trucks quit delivering logs? Did you make any inquiry? You were the mill superintendent.

A. Vander Jack's trucks quit delivering logs several times.

Q. Were you ever out of logs there where you couldn't operate for lack of logs, during the summer of '53? A. No, sir.

Q. Now then, upon the occasion when Vander Jack's trucks were not delivering after the 21st, and after you had your—pardon me—after Mr. Vander Jack had his conversation with you, did you make any inquiry about the reasons for any cessation of deliveries by Vander Jack? A. No, sir.

Q. You just didn't make any inquiry?

A. No, sir.

Q. You were, however, receiving logs from Walker Brothers at that same date, weren't you?

A. No, I don't think Walker started on the same day. I think in the latter part of the month or the first part of November.

Q. He started quickly enough that you weren't concerned about your log supply, isn't that true?

A. No. We sweated a lot of blood for logs.

Q. You had in your cold deck at that time about

(Testimony of Ted R. Greene.)

a million two hundred thousand, didn't you, from Lawrence Warehouse? A. That is true. [433]

Q. You didn't take any of those logs out of the log deck at that time, did you?

A. You don't generally do those things.

Q. Well, did you or didn't you?

A. No, we did not.

Q. You did not? A. We did not.

Q. You had sufficient logs that you didn't have to take any out of this cold deck? Now, how many feet would your pond hold?

A. Oh, two million, tight.

Q. Two million, tight? Now then, on October 21, 1953, was it tight? A. In one respect, yes.

Q. What respect was that?

A. If you want to figure gang logs and oversize logs.

Q. All right. It was tight because there were oversize logs in there that you hadn't made disposition of, is that right? A. That's right.

Q. All right. How many of those oversize logs were in there?

A. I believe there was better than a million feet.

Q. Better than a million feet? A. Yes.

Q. All right. That is a million feet that would not be usable by this mill? A. That is true.

Q. You had a million two hundred thousand in your cold deck in the pond. That is two million two hundred thousand. What did you operate on after Vander Jack quit delivering logs and before Walker started? A. We purchased logs.

(Testimony of Ted R. Greene.)

Q. You purchased them the same day that Vander Jack quit [434] delivering, didn't you?

A. I don't know whether it was the same day or not.

Q. Probably the next morning, if it wasn't the same day? A. Soon after.

Q. You had it all arranged to have logs delivered in there on October 21st or October 22nd, didn't you? A. That is not true.

Q. They were, nonetheless, delivered on those days from other sources, is that not true?

A. That is true.

Q. Do you know Mr. Vander Jack, Sr.?

A. Beg your pardon?

Q. Did you know the senior Mr. Vander Jack?

A. I have met the gentleman once.

Q. When you say you had a conversation with Mr. Vander Jack, you mean young Mr. Clarence C. Vander Jack, or the older gentleman, the father, Clarence Vander Jack?

A. I had a conversation with Mr. Vander Jack, Sr.

Q. When was that?

A. Oh, approximately a month after he quit delivering logs; after the old gentleman had taken over the operation.

Q. You had no conversation with him up through, rather, October 21, 1953?

A. No; never met him.

Q. And when you speak of Mr. Vander Jack

(Testimony of Ted R. Greene.)

talking with you on the day that deliveries ceased, you mean Mr. Vander Jack the younger?

A. Yes.

Mr. Hilger: That is all. [435]

Mr. Goodwin: Thank you, Mr. Greene.

(Witness excused.)

Mr. Goodwin: Your Honor, after a witness has testified I am assuming your order of exclusion is no longer applicable to them, is that right?

The Referee: Correct.

Mr. Margolis: If they are not going to be called again.

Mr. Goodwin: Is there any reason why Mr. Greene cannot remain in the courtroom?

The Referee: Are you going to recall him?

Mr. Goodwin: No.

The Referee: Regardless of what may happen?

Mr. Goodwin: I can't think of any reason, unless I call him for some sur-rebuttal.

I will now call Mr. Phillips.

CECIL ROY PHILLIPS

called as a witness for the Respondents; sworn.

The Referee: What is your name?

A. Cecil Roy Phillips.

Direct Examination

By Mr. Goodwin:

Q. Where do you live?

A. Redwood Creek.

(Testimony of Cecil Roy Phillips.)

Q. By whom are you employed?

A. Mr. Peters; Timber, Inc.

Q. You have been employed since how [436] long?

A. Since June 19, 1952.

Q. What has been your occupation there?

A. Well, first, a little over a year I worked in the mill; then I worked on the pond, a crane operator.

Q. During 1953—the logging season of 1953—you worked on the pond, is that correct?

A. Yes, sir.

Q. Full time? A. Yes, sir.

Q. Were there other pond men employed at Timber, Inc., at that time? A. Yes, sir.

Q. Now, during the logging season of 1953 did you have occasion to observe the log dump?

A. Sure.

Q. Regularly? A. All the time.

Q. That was a part of your employment, was that correct? A. Yes, sir.

Q. During this period of time was the log dump blocked or plugged on any occasions? A. Yes.

Q. How long, or how often, did this happen, Mr. Phillips?

A. Oh, sometimes a couple or three times a day, and then sometimes only once a day; but then some days not any.

Q. When the dump would become plugged was anything done to unplug it?

A. Yes, sir. We moved the crane over, and just as soon as it got plugged, and unplugged it.

(Testimony of Cecil Roy Phillips.)

Q. When the dump would get plugged, what would cause the plugging?

A. Well, when you roll logs off a truck, see, it is about, oh, a 15-foot incline there, where they go in the water, and they will cross up sometimes, and they [437] keep piling them on each other, and so they pile up, and you have got to clean them out.

Q. Where the plugging would occur you would take your equipment and men over there and go to work on unplugging it? A. Yes, sir.

Q. During this logging season was the pond plugged for any extended period of time?

A. I can't remember of any time that it was plugged for over an hour and a half, two hours at the most.

Q. Was plugged for just long enough——

A. Just long enough to move the crane, and maybe we would be across the pond, and we would have to move the crane over to the dump and unplug it.

Q. Were the deliveries of logs to the pond by Vander Jack evenly spaced?

A. Well, no, they wasn't. The most of the time there would be several trucks come in at the same time. That way the dump would be more apt to plug up, if you dump several loads right quick.

Q. Would there be any more, or less, deliveries to the pond in the morning or afternoon, or was there any difference?

A. Well, I never noticed a lot of difference.

(Testimony of Cecil Roy Phillips.)

There was some later in the morning, and then in the afternoon.

Q. But usually you say that on many occasions the trucks would come in, several of them, in a string—in a bunch? A. Yes.

Q. Now, was anything done at night or early in the morning [438] with reference to the boom-sticks, to obtain open water?

A. Yes. The way we did it, we would try to keep enough logs in one pocket of the boom to keep the mill going for sure, and then if there was—if we got enough in there to run the mill, why, we would swing the boom back around and then throw them in the cold deck side.

Q. Well, now, when you swung the boom around, would that leave—would the effect of that be to leave some open water underneath the dump?

A. Yes.

Q. Was that done regularly?

A. Yes. See, we was decking them almost every day there, when we got logs every day, and so when we got plenty of logs to the mill side to run the mill we would go ahead and put them in the deck side.

Mr. Goodwin: That is all.

Cross-Examination

By Mr. Hilger:

Q. Mr. Phillips, you are a crane operator?

A. Yes, sir.

Q. Jerry—was his name Hopper—

A. Hooker.

(Testimony of Cecil Roy Phillips.)

Q. —Hooker took your place as pond man, didn't he, when you went on the crane?

A. No.

Q. When was he pond man out there?

A. Jerry worked on the pond there the end of '53, and he wasn't there in '52—I don't think he was.

Q. You were on the pond, then, basically, in '52?

A. No; I was on the pond in '53, I think. I think I went on [439] the pond in August, I am not sure.

Q. You went on the pond in August? Prior to that time you had been on the crane?

A. No. Well, the crane and pond. I went on the crane at that time, and I worked on the crane, and pond, too. If we are not running the crane I worked on the pond. The cranes, if we are decking, or tearing down deck, or something to do with the crane, why, I work on the crane. If not, why, I am out on the pond.

Q. Did you ever unload any logs from that crane? A. Sure.

Q. From the trucks, with the crane, rather?

A. Yes. I think the most we have unloaded in one day was 45 loads for the deck.

Q. That was up on dry land?

A. That is in water. I mean, we deck inside the water.

Q. You unload the logs and swing them around and drop them in the water?

A. Unload the trucks.

(Testimony of Cecil Roy Phillips.)

Q. Are you the one that dropped the log across one of the Vander Jack reaches?

A. I don't remember if I did or not. I might have. That will happen sometimes. I can remember one trailer last winter that we got a log on. But that will happen any time.

Mr. Hilger: That is all.

Mr. Goodwin: Thank you. You can step outside, please.

(Witness excused.)

Mr. Stark: We have one more witness from Eureka, Judge. [440] It will only take a few minutes with him. Can we have a couple of minutes?

The Referee: Yes. You can go 'til a quarter after, if you only take a couple of minutes. You have got about three minutes—five minutes.

EVERETT R. EDWARDS

called as a witness for the Respondents; sworn.

The Referee: Your full name is what?

A. Everett R. Edwards.

Direct Examination

By Mr. Goodwin:

Q. Where do you live, Mr. Edwards?

A. Out at camp—Timber, Inc.'s, camp.

Q. Are you employed by Timber, Inc.?

A. Yes.

Q. How long have you been so employed?

(Testimony of Everett R. Edwards.)

A. I came to work there in April 7th of '53.

Q. What capacity was your job?

A. Well, I have been on the pond; sawed logs for the mill.

Q. You have worked on or about the pond ever since you have been out there, haven't you?

A. Yes. Never worked in the mill since I have been there.

Q. During the logging season of 1953 you were working on the pond, were you not?

A. Yes.

Q. Some part of that time you worked at night?

A. Well, I have worked at night when I first went there. But I think it was around in July I went to work in daytimes. [441] Might be a little bit one way or the other, but around in there somewhere.

Q. What were your duties as a pond man? What were you doing?

A. Well, we sawed the logs. You know, they come in, a lot of times they are 48-foot lengths. Well, I had to cut them on the pond before they were sent to the mill to be run through the gang.

Q. Did you move logs around as required in the pond?

A. Oh, yes, we swung booms, you know, logs—boom logs; we had to move logs.

Q. Were you familiar with the log dump there, Mr. Edwards?

A. Yes.

Q. During that summer of 1953 was the dump plugged?

A. Well, like any other log dump, they always

(Testimony of Everett R. Edwards.)

get plugged once in awhile. You get right on it and unplug it.

Q. Plugging did occur on occasions, is that right? A. Oh, yes.

Q. What caused the plugging when it did plug?

A. Well, they would dump a load of logs. They might get crossed up and get grounded down there, and if there was a few trucks there, why, they just dump them right in until they get rid of the trucks, and then they jump on it and start straightening it out.

Q. Was the dump plugged during that logging season for any extended period of time?

A. Oh, maybe it would be dumped for an hour or two hours, but that would be all. [442]

Q. Be plugged, you mean, for an hour?

A. Yes; until we got it straightened out again.

Q. When a plug did occur was it part of your job—one of your duties—to go over and work on it?

A. Sure.

Q. There were other pond men on the payroll that worked on the pond? A. Oh, yes.

Q. And their duties were the same as yours?

A. Everybody had to go over, because we generally had enough logs in the pocket to go to the mill that were all cut. But everybody went over and worked on it.

Q. Was anything done on the pond at night-time to be sure the dump was open in the morning?

A. Well, they would saw logs all night. But you mean right in the evening, or——

(Testimony of Everett R. Edwards.)

Q. Or during the night shift did you do anything so that the pond would be open in the morning—the dump would be open in the morning?

A. Well, the only thing, we had a boom there that we swung back and forth, that anything that was marked for deck, why, we swung the boom, and then when we would move it back they would mark that for the mill, and then we would have to swing the boom back.

Q. And the result of moving this boom from place to place would leave the water underneath?

A. Then they sawed all night. It left enough for nighttime or next day. There would be enough room.

Q. What do you mean, open water?

A. Well, where [443] we had used the logs out there would be water there, you see, so other logs, you know, where you could dump.

Q. Where you could dump more logs?

A. Yes.

Q. Were the logs delivered by Vander Jack pretty even deliveries, or were they bunched up, or what was the general practice?

A. Well, generally in the morning there was not too much. Oh, generally about lunch time most of the big run would come in.

Q. More than one truck would come in at that time?

A. I would say ten or twelve trucks lined up to get scaled and dumped.

(Testimony of Everett R. Edwards.)

Q. A string of trucks, then, would show up at some particular time?

A. Well, they would just gang up there, you know, and just keep coming.

Cross-Examination

By Mr. Hilger:

Q. You, Mr. Edwards, are still employed by Timber, Inc., are you not? A. Yes.

Q. Do you know Mr. Phillips, who preceded you on the stand? A. Yes.

Q. Cecil Phillips? A. Yes.

Q. He is also still employed there at Timber, Inc., isn't he? A. Yes.

Q. And Ted Green is still the superintendent out there, is he not? A. Yes.

Q. You said that logs were marked for the deck. How were they marked?

A. I guess they marked them on the [444] scale slips, the scale load of logs; they would just mark "Deck" on the slips.

Q. Well, then, that load of logs could be dumped into the pond, isn't that right? A. Yes.

Q. How did the pond man know where to put that load of logs if there wasn't a mark on the log, itself?

A. There was a boom—they had a boom across from our saw shack, and they would just dump in there. We would swing the boom over this way, and they would mark everything else "Deck." That

(Testimony of Everett R. Edwards.)

would all go into the biggest part of the pond, then.

Q. You mean that every one of the scale tickets that your dump man had had marked on it "Deck," as to all logs that went into the deck?

A. Well, that is the way they kept them separate.

Q. And any log that went into the deck, then there would be a scale ticket that the dump man would have them, have "Deck" marked on it?

A. Yes.

Q. And those that didn't would be for current production—put over into the side of the pond where you were sawing out of?

A. Yes.

Q. And then those scale tickets, at the end of the day, would be turned in to the office?

A. Yes; I suppose that is what they would do, turn them in.

Mr. Hilger: That is all.

Mr. Goodwin: Thank you. Step out, please.

(Witness excused.) [445]

Mr. Goodwin: Your Honor, I believe, asked what was the first written notice that the logs should not be delivered to Arcata, or should not be delivered to town. Is that what your Honor wanted? The earliest thing we can find in our files is a letter here that I am agreeable to introducing into evidence if there is no objection.

Mr. Hilger: I will stipulate that Mr. Vander

Jack received the original of this letter, and have no objection to it going into evidence.

Mr. Goodwin: Very well.

Mr. Hilger: For the purpose only of demonstrating that, as of September 12th, a communication was addressed. We dispute the truth of its contents.

Mr. Goodwin: Very well.

The Referee: Just for the date of the first notification.

Mr. Goodwin: That is the earliest one I can find, your Honor—September 12th.

We will offer it, then, as our next in order.

The Referee: Claimant's No. 4 it will be.

(Letter dated September 12, 1953, from Timber, Inc., to Vander Jack, admitted in evidence as Claimant's Exhibit No. 4.)

Mr. Goodwin: We rest, your Honor.

(Respondents rest.)

The Referee: We will adjourn now and reconvene at 10:30 a.m. tomorrow morning.

(Adjourned to Tuesday, January 22, 1953, at 10:00 a.m.) [446]

Tuesday, January 22, 1957—10:30 A.M.

Same appearances.

The Referee: Proceed in Snow Camp Logging.

Mr. Hilger: At this time, by way of rebuttal, I would like to call Mr. Clarence Vander Jack.

The Referee: Very well.

CLARENCE VANDER JACK

called as a witness for the Trustee in rebuttal;
sworn.

The Referee: Clarence Vander Jack.

Direct Examination

By Mr. Hilger:

Q. Your name, sir, is Clarence Vander Jack?

A. That is right.

Q. You are, and were in 1953, one of the partners of Snow Camp Logging Company?

A. Yes.

Q. You are the father of Clarence C. Vander Jack who previously testified in this matter?

A. Yes.

Q. I am referring to a period on or about October 21, 1953, Mr. Vander Jack. At that time did you have any conversation with Mr. S. A. Peters?

A. I did, over the telephone.

Q. You called him? A. I called him.

Q. What was the occasion for the call, Mr. Vander Jack?

A. Well, Clarence had told me they had stopped taking logs from us. [447]

Q. And at that time what did you say to Mr. Peters and what did he say to you?

A. I called Mr. Peters and asked if that was true. He said that was true. I called Mr. Peters.

Q. Yes?

A. I asked if he quit taking logs from us. He said he had.

(Testimony of Clarence Vander Jack.)

Q. Was anything further said?

A. I asked him the reason why. He said he was going to cut his own logs from now on.

Q. Was anything further said?

A. I told him he had a contract with us. He said he knew that all right; he had a contract with us, but it did not amount to much. I said, "It would be an awful hardship on us if we cannot deliver logs to you." He said that was our problem.

Q. He said what?

A. He said that was our problem. I said, "I am going to see if we cannot do anything about it." The words he used was, "O. K., Skipper, go ahead. I am going to cut my own logs from now on."

Q. Was anything further said?

A. No; that was all that was said.

Mr. Hilger: That is all.

The Referee: Cross-examine?

Cross-Examination

By Mr. Goodwin:

Q. Do you know whether Mr. Peters did that?

A. Did what?

Q. Cut his own logs?

A. I don't know. He did [448] not cut ours, I know that.

Q. That is the only conversation you had?

A. That evening; the only conversation I had with Mr. Peters that evening.

Q. Did you have others?

(Testimony of Clarence Vander Jack.)

A. I talked to Mr. Peters all the time before that; never anything was said about not taking our logs.

Q. How about after that?

A. I did not talk to him any more.

Q. What date was that?

A. I think I was told it was October 21, 1953, right about the date they had trouble in the pond. They had a lot of trouble there, so far as that is concerned.

Q. Did you have any subsequent conversations with anyone from Timber, Inc. after that?

A. No.

Q. Did you have any conversation with Mr. Greene?

A. I never talked to Mr. Greene. I went straight to the man that was on the top; I went to Mr. Peters.

Q. After October 21, 1953, did you ever talk to Mr. Greene about delivering logs?

A. I don't know if I ever talked to Mr. Greene.

Q. Do you have any recollection of talking to him?

A. I don't think I have. I used to talk to Mr. Welch. I never talked to Mr. Greene that I know of.

Q. You never did?

A. I don't think I have.

Q. Are you sure about that?

A. I could not be too sure. [449] It is a long

time ago. I might have forgotten about it. But I don't think I ever talked to Mr. Greene.

Mr. Goodwin: That is all.

Mr. Hilger: That is all. Thank you, Mr. Vander Jack.

(Witness excused.)

Mr. Hilger: I would like to recall Clarence C. Vander Jack.

The Referee: In rebuttal?

Mr. Hilger: In rebuttal.

CLARENCE C. VANDER JACK

recalled as a witness for the Trustee in rebuttal; previously sworn.

The Referee: You have been sworn already.

Direct Examination

By Mr. Hilger:

Q. Mr. Vander Jack, referring to the summer of 1953 and early fall of 1953, what was your practice in regard to the branding of logs you produced?

A. We branded each and every log on both ends, and probably four brands on each end of the log, and they were placed near the outside edge of the log so the brand would show when it was in the water. That is the proper way of branding logs that go into the water so they will be quickly recognized.

Q. That was standard practice during your entire deliveries to Mr. Peters? A. Absolutely.

(Testimony of Clarence C. Vander Jack.)

Q. I believe in your previous testimony you have outlined [450] how you used your various brands to determine your cost of production.

A. That is correct.

Q. And what brands did you use?

A. We had, I think, possibly up to five or six brands. We had "V-J," "J-1," "J-2," "J-3," "J-4," "J-5"; we had a "K-S"; we had a "J." Those are some of the brands. I would have to look at our record on brands. They were all registered brands, also.

Q. Registered how?

A. A brand must be registered in order to legally show you own that log. You stamp a brand on a log and the brand is not registered, it is like branding a cow that is not actually your brand, and it could be construed to belong to somebody else.

Q. Showing you a portion of an exhibit in evidence, a folder headed "Net Scale Production March 16 to 31, 1953," the first page as we read at the top of the leftmost column is "V-J."

A. That is right.

Q. That would be the brand of those logs?

A. It would be.

Q. Line 20 is "J-2."

A. That would be the brand of those logs.

Q. The second page, the top, the leftmost column is "J-3." That would be the brand of those logs?

A. That would be.

Q. Line 20 at page 2 is "K-S." That would be the brand of that particular group of logs?

A. It would be.

(Testimony of Clarence C. Vander Jack.)

Q. And the last page is a summary of the three preceding.

Now then, these various brands were related to the cost [451] of the logging set upon which these logs were produced? A. That is correct.

Q. That enabled you to account for the cost of the various logs and match it against the revenue received? A. That is right.

Q. That was your invariable practice throughout your deliveries to Peters?

A. It was before that, it has been since, and during that time.

Q. Now, how many trucks are loaded at one time on a logging set? A. One.

Q. Do you put the logs on all at once, or one at a time?

A. They are put on one at a time.

Q. You keep putting on these logs one at a time until you get a load? A. Right.

Q. And the size logs you were delivering to Mr. Peters' mill, approximately how many logs constituted an average load?

A. On his, about 18 logs would constitute an average load over a private road.

Q. Those were small logs? A. Yes.

Q. You were hauling to him on a private road and did not have to worry about weight?

A. We did not.

Q. Eighteen logs put on individually constituted a load? A. That is right.

Q. The trucks were loaded one at a time?

A. They were.

(Testimony of Clarence C. Vander Jack.)

Q. About how long does it take on the average to load a load [452] that size?

A. With the most modern equipment available, which we had at that time, it would take 18 to 20 minutes to load that type of load.

Q. In other words, you could only load out one truck every 18 to 20 minutes? A. Right.

Q. It would be impossible for you to bunch several trucks bumper to bumper into any mill.

A. That is right.

Q. Are you familiar with unloading practices such as were described in the testimony yesterday, at the Peters mill? A. Very.

Q. That is the way all the logs are just dumped off at one time? A. Right.

Q. Approximately how long on the average does it take to unload a load of logs?

A. It would not take more than five minutes to unhook the binders, get the trailer back on the truck and on its way.

Q. What equipment did you use in the woods on a logging set?

A. One set constituted three "Cats" for logging and one for building road, and we had a loading machine, a large crane with a gooseneck boom on it. We had two arches and water trucks, and various other minor equipment.

Q. And what is the reasonable value per hour for the use of such equipment?

Mr. Stark: We object to this, if your Honor please, on the ground that it is not rebuttal testi-

(Testimony of Clarence Vander Jack.)

mony at all. As a matter of fact, it was already testified to on direct examination [453] of this man, and we did not even cross-examine on the subject.

The Referee: It is not rebuttal.

Mr. Hilger: I withdraw it.

That is all.

The Referee: Cross-examine?

Mr. Goodwin: No questions.

(Witness excused.)

Mr. Hilger: By way of a statement to the Court, inasmuch as the record, or a portion thereof, at least, of the action in the State court has been introduced by the Claimant, I would like to complete that matter by observing to the Court that the Claimant in the matter, or in this matter, and the Defendant in the State court action, moved the State Court to have the matter tried without a jury, after the matter was set as a jury case in October, and upon such motion the State Court set the matter as a non-jury case, and that was upon the motion of the Defendant there, the Claimant here.

Isn't that correct, Mr. Goodwin?

Mr. Goodwin: It was originally set as a jury trial at your request, and after a jury had been waived and we objected to the jury——

Mr. Hilger: That is correct, you objected to a jury, and the result of that objection was that it was changed to a non-jury setting.

Mr. Goodwin: That is my recollection.

Mr. Hilger: And the judge before whom this matter was [454] set was unable to try the same because he was taken to the hospital for surgery. And then it was re-set for a later trial, at which time the Trustee filed his objection and initiated this proceeding. The judge before whom this matter was set since died.

Mr. Stark: It is true, however, that the trial in the State court was set for trial on a date certain, which preceded the date this hearing came on for hearing.

Mr. Hilger: It had at one time been so set, but was unable to be tried because of the fact that the judge went to the hospital on that date.

Mr. Goodwin: That is true. And on one occasion it was reset for another date, and we were restrained, as I remember, from proceeding with the action.

Mr. Hilger: That is correct. But the second setting was subsequent to the initiation of this proceeding; the first setting was prior, the second setting was subsequent.

Mr. Goodwin: I think it was set the second time prior to this. I am sure it was.

Mr. Stark: What happened was this——

Mr. Hilger: It was set, but the time set would have occurred subsequent to the initiation of this proceeding.

Mr. Stark: That is right. Here is what happened: You started the hearing on your objections and sought a continuance. That would have carried

you by the date the matter was set for the State court. [455]

Mr. Hilger: We did not seek a continuance. The continuance was granted on the Court's own motion.

Mr. Stark: Let's not quibble about words. The continuance occurred. At the time the continuance was indicated you asked the Court to restrain the parties in the State court action.

Mr. Hilger. That is correct.

Mr. Goodwin: That is correct.

Mr. Stark: Is that the Trustee's case?

Mr. Margolis: Yes.

(Trustee rests rebuttal.)

Mr. Stark: We have one witness on sur-rebuttal.

The Referee: Very well.

TED R. GREENE

recalled as a witness for the Respondents in sur-rebuttal; previously sworn.

Direct Examination

By Mr. Goodwin:

Q. Mr. Greene, you know Mr. Vander Jack, Sr.? A. I have met the gentleman.

Q. Have you ever had any discussions with him about delivering logs to Timber, Inc.'s mill?

A. True.

Q. Can you tell me when?

(Testimony of Ted Greene.)

A. Oh, not to the day but it was approximately, I would say, a month after Mr. Vander Jack, Jr., quit delivering.

Q. Where did the conversation take place?

A. At the mill at Redwood Creek.

Q. Who was there, Mr. Greene?

A. Mr. Vander Jack and myself.

Q. That is Mr. Vander Jack, Sr.?

A. True.

Q. What was the conversation?

A. Could I explain it from the start?

Q. Yes.

A. One day I was going down by where they was scaling at the ranch house. I used to stop and talk quite often to Merle Montgomery, their scaler—our scaler, too—and he said, “Why don’t you go talk to Mr. Vander Jack, the old man? He has taken over. I think you can get together with him. He is a pretty fair old fellow.” So that evening I went to town and called Mr. Vander Jack, and Mrs. Vander Jack answered the phone and said the old gentleman was taking a shower. So in about half an hour I called back. I talked to him; told him who I was. I told him I would like to talk to him about logs. He said he would be up at Redwood Creek in a day or two, which he was. I met him there and talked to him about logs.

Q. What was the conversation?

A. He said that Mr. Peters owed him some money for work around the pond, or something else.

(Testimony of Ted Greene.)

What it was, I don't know. He said pay that and we would get together.

Q. If Mr. Peters would pay the money he owed him you could get together on logs?

A. Get together. [457]

Q. Was that the extent of the conversation?

A. That was the extent of the conversation.

Mr. Goodwin: That is all.

Mr. Hilger: No questions.

Mr. Goodwin: Thanks.

(Witness excused.)

Mr. Goodwin: That is all we have, your Honor.

(Respondents rest sur-rebuttal.)

Mr. Stark: I imagine, your Honor, if you don't particularly desire it, nevertheless you would grant the privilege of our preparing and submitting to you a summary of the evidence and the points and authorities in support of our position. I believe if your Honor remains consistent, as I know you will, as relates to the pleadings in this action, that would mean that the objecting Trustee would have the opening burden.

Mr. Hilger: I want to call Mr. Vander Jack in sur-rebuttal about this conversation.

Mr. Stark: Did he hear the testimony?

Mr. Hilger: He heard the testimony and is prepared to testify about it.

Mr. Stark: He already said he did not remember any conversation. We will stipulate that if he

takes the stand he will deny the truth of what our witness said.

Mr. Hilger: I don't know that that will be the testimony. He says he recalls the conversation and much of what was said. [458]

Mr. Stark: All right.

CLARENCE VANDER JACK

was recalled as a witness for the Trustee in sur-rebuttal; previously sworn.

Direct Examination

By Mr. Hilger:

Q. You heard Mr. Greene's testimony regarding the conversation you had with him?

A. Yes. He had to wait awhile on it because I was in the bath.

Q. Having heard the testimony, do you now recall the series of conversations?

A. Yes. I did not know Mr. Greene very well. As a matter of fact, I never met him. I seen him around the mill, but I did not go around the mill much.

Q. Having seen him and heard his testimony, do you recall the conversation?

A. I remember the conversation.

Q. Would you tell us what was said at the conversation?

A. He wanted to take logs from us at \$28.00 a thousand. We could not afford to put them in for that.

(Testimony of Clarence Vander Jack.)

Q. He wanted to take logs at \$28.00 a thousand. Was that his proposition to you?

A. That was his proposition to us.

The Referee: You say "he" wanted. For whom?

A. He wanted to buy logs from Snow Camp Logging Company.

Q. For whom?

A. For Mr. Peters, at \$28.00 a [459] thousand, but we could not afford to put them in for that.

Mr. Hilger: I see.

Q. Was there anything further in the conversation that you recall?

A. That is all I remember of the conversation.

Cross-Examination

By Mr. Stark:

Q. Did he say to you that he had authority from Mr. Peters, or any other corporate officer, to make that proposition to you?

A. No. It sounded to me that he was talking on his own, but he must have had orders from Mr. Peters.

Mr. Stark: I ask that "he must have had orders from Mr. Peters" go out.

The Referee: It may go out.

Q. (By Mr. Stark): It sounded to you like he was talking on his own? A. Yes.

Mr. Stark: That is all.

(Witness excused.)

The Referee: Go ahead, Mr. Stark.

Mr. Stark: You have in mind what I stated before? Apparently, being consistent, it would be the right of the Trustee—put it that way—to open with his points and authorities, and we to answer, he to reply. Because of my awareness of the extreme pressure Mrs. Blair works under all the time here, I think it would be right to say to us that they should file their opening brief a stipulated number of days [460] after the receipt of the transcript, because she does not know, and certainly we don't know, when she will be able to get it out. Certainly our time should not be running on it.

Mr. Margolis: We stipulate to that, your Honor.

Mr. Stark: How much time do you want, Mr. Margolis?

Mr. Margolis: By reason of the distances between our offices and the scope of the matter, I would suggest perhaps 30 days.

Mr. Stark: Thirty days after the transcript is filed.

Mr. Hilger: If your Honor please, in the interest of dispatch, I would like to ask for not more than ten days after the receipt of the transcript.

Mr. Stark: That is not enough time.

Mr. Hilger: That is, for us. You may have 30 days to file your answer.

The Referee: Thirty, thirty and ten; the first brief to be filed 30 days after the filing of the transcript.

Mr. Margolis: Thirty, thirty and ten.

Mr. Stark: I don't get out here much, and I

cannot leave without thanking you for your courtesy, to me, especially.

The Referee: Thank you, Mr. Stark. I try to treat everybody that way, whether they are from San Francisco or up in the country. Sometimes we get a little cross.

Mr. Hilger: I certainly thank you for the consideration extended to me in appearing before you, and the attention you have given the matter.

(Submitted—30, 30 and 10.)

[Endorsed]: Filed January 28, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

1. Proof of Claim.
2. Trustee's petition for order disallowing claim under Sec. 57(d) of the Bankruptcy Act and for judgment for affirmative relief.
3. Order to show cause.
4. Special appearance of S. A. Peters, an individual, and Timber Incorporated of California, etc.

5. Affidavit of G. Edward Goodwin in support of motion for withdrawal of claim.

6. Motion for order authorizing withdrawal of claim of S. A. Peters and Timber Incorporated of California.

7. Return to order to show cause; motion to discharge order to show cause and plea in abatement.

8. Bill of particulars.

9. Notice of decision.

10. Findings of fact and conclusions of law.

11. Order, judgment and decree.

12. Proposed amendments to and objections to findings of fact, etc., (Rejected March 22, 1958).

13. Petition for review.

14. Order, judgment and decree.

15. Order directing Clerk to issue writs of execution, etc.

16. Memorandum and order.

17. Notice of appeal.

18. Statement of points on appeal.

19. Designation of portions of record on appeal.

20. Certificate and report of Referee relative to petition for review filed on April 2, 1958.

21. Reporter's Transcript (Vol. 1).

22. Reporter's Transcript (Vol. 2).

23. Reporter's Transcript (Vol. 3).

24. Sixteen (16) Depositions.

25. One (1) folder containing exhibits.

26. Trustee's exhibits 1, 2 & 3.

27. Debtor's exhibit A.

28. Twenty (20) folders containing work sheets.

29. Order extending time to docket appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 30th day of December, 1958.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 16322. United States Court of Appeals for the Ninth Circuit. S. A. Peters and Timber, Inc., of California, Appellants, vs. Kal W. Line, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: January 12, 1959.

Docketed: January 15, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16322—In Bankruptcy

In the Matter of

SNOW CAMP LOGGING COMPANY, a Copartnership Composed of Clarence Vander Jack, Clarence C. Vander Jack, and Horace Mecklem, Jr., and Jeanne V. Mecklem; CLARENCE VANDER JACK, CLARENCE C. VANDER JACK and HORACE MECKLEM, JR., and JEANNE V. MECKLEM, Individually,

Bankrupts.

STATEMENT OF POINTS ON APPEAL

To the Clerk of the Above-Entitled Court:

The points upon which Appellants intend to rely on this appeal are as follows:

1. The United States District Court for the Northern District of California, Northern Division, erred in affirming a finding of the Referee in Bankruptcy, that the Bankrupt, Snowcap Logging Company, a copartnership, was the owner and is now the owner of any claim or cause of action against either S. A. Peters or Timber, Incorporated of California, appellants herein.

2. The United States District Court for the Northern District of California, Northern Division, erred in affirming a finding by the Referee in Bankruptcy that there is even one scintilla of testimony

or documentary proof in the record in support of the allegation made by the trustee for his order to show cause directed to appellants that the assignment by the bankrupt partnership to a corporation of the contract between Appellants and the Bankrupt was made without any consideration and that it remained as a valuable asset of the partnership and was not owned by the assignee corporation.

3. The United States District Court for the Northern District of California, Northern Division, erred when it affirmed the action by the Referee in Bankruptcy restraining an action pending in the Superior Court of the State of California, in and for the County of Humboldt, which action had long been pending at the time of the filing of the petition in bankruptcy and which related to the same subject matter as the trustee's objection to the claim of appellants.

4. The United States District Court for the Northern District of California, Northern Division, erred when it affirmed a finding of the Referee in Bankruptcy when he held that there had been no accord and satisfaction between the bankrupt and appellants.

5. The United States District Court for the Northern District of California, Northern Division, erred when it affirmed the action of the Referee in Bankruptcy in overruling the objection to the jurisdiction of the Bankruptcy Court and refusing to abate the proceedings in the bankruptcy court.

6. The United States District Court for the Northern District of California, Northern Division, erred when it affirmed the action of the referee in bankruptcy in refusing an offer of appellants to prove that the bankrupt partnership entered into a written contract to deliver gang logs elsewhere than to appellants contrary to its contract.

7. The United States District Court for the Northern District of California, Northern Division, erred when it affirmed the action of the Referee in Bankruptcy in sustaining an objection and refusing an offer of proof by Appellants that the bankrupt copartnership did in fact deliver substantial quantities of gang logs to other persons than appellants, contrary to its contract.

8. The United States District Court for the Northern District of California, Northern Division, erred in affirming the amount of damages computed and awarded by the Referee in Bankruptcy against appellants.

9. The United States District Court for the Northern District of California, Northern Division, erred in affirming an award of damages made by said Referee in Bankruptcy in favor of Appellee and against Appellants in the sum of \$674,627.40.

10. The United States District Court for the Northern District of California, Northern Division, erred in affirming a ruling by the Referee in Bankruptcy that the jurisdiction of the Bankruptcy Court was superior to that of the Superior Court of Humboldt County, whereas the jurisdiction of

Humboldt County Superior Court had attached prior to the filing of the petition in bankruptcy.

11. The United States District Court for the Northern District of California, Northern Division, erred in affirming the action of the Referee in Bankruptcy in ruling that comity did not compel the trustee to continue the State Court action which was first begun long prior to the filing of the petition in bankruptcy.

12. The United States District Court for the Northern District of California, Northern Division, erred in affirming the action of the Referee in Bankruptcy in enjoining appellants and appellants' attorneys from proceeding in the State Court action in Humboldt County.

13. The United States District Court for the Northern District of California, Northern Division, erred when it refused to vacate the ex parte orders dated March 26, 1958, and April 11, 1958, both obtained without any notice to Appellants.

14. The United States District Court for the Northern District of California, Northern Division erred when it made its order dated October 30, 1958, affirming the judgment and decree of March 25, 1958, entered by the Referee in Bankruptcy in the above-entitled action for which appellant sought review.

Dated January 23, 1959.

L. W. WRIXON,
CHARLES M. STARK,

PAUL W. McCOMISH,
HUBER & GOODWIN,

By /s/ CHARLES M. STARK,
Attorneys for Appellants S. A. Peters and Timber,
Inc., of Calif., a Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed January 23, 1959.

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

It is hereby stipulated by and between the appellant and appellee herein that the judges of the above-entitled court may examine and consider all exhibits forwarded to the above-court en re this appeal and that said exhibits need not be printed as part of the record on appeal.

Dated: February 13th, 1959.

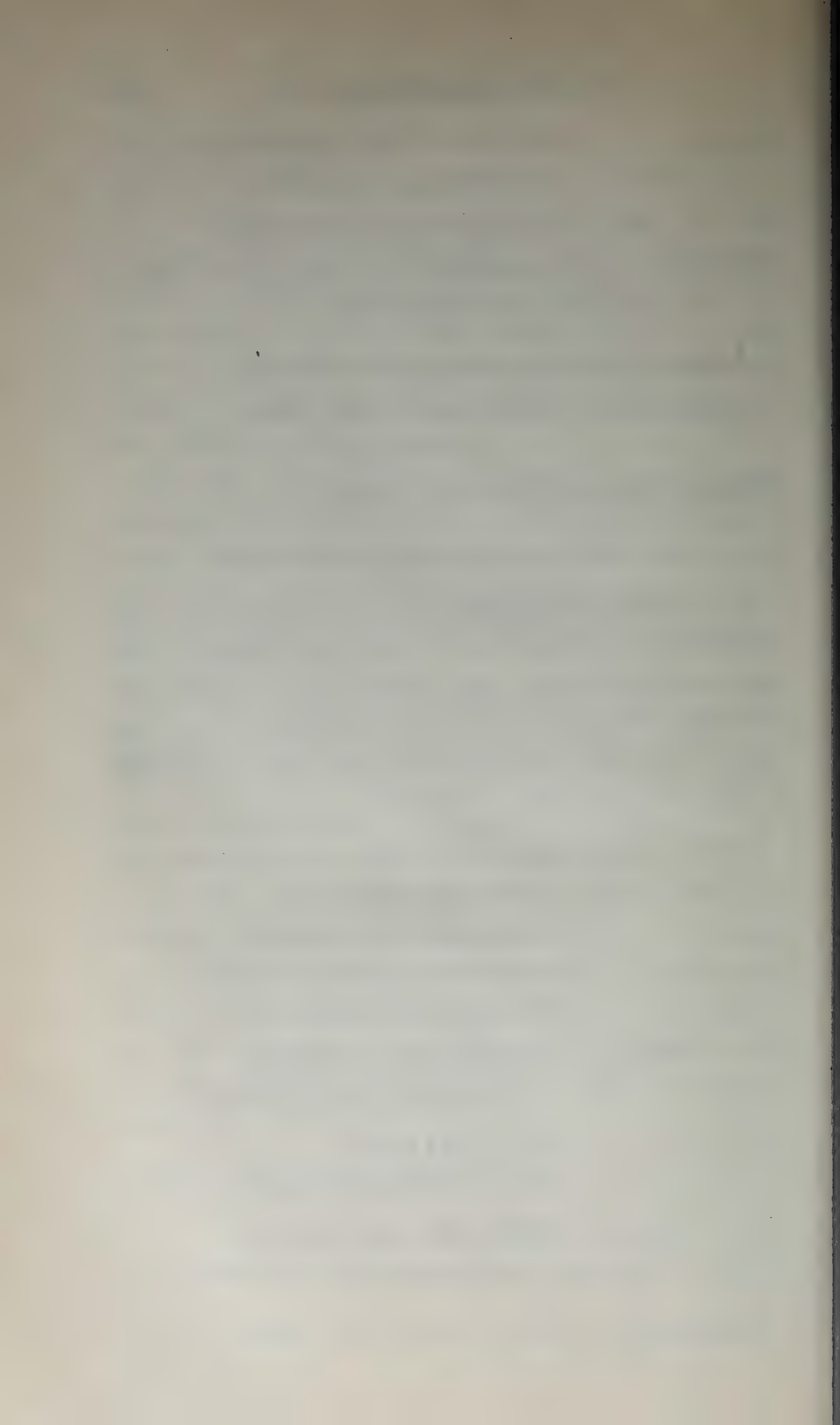
L. W. WRIXON,
CHARLES M. STARK,
PAUL W. McCOMISH,
HUBER & GOODWIN,

By /s/ CHARLES M. STARK,
Attorneys for Appellant.

F. L. HILGER,
MAX H. MARGOLIS,

By /s/ MAX H. MARGOLIS,
Attorneys for Appellee.

[Endorsed]: Filed February 18, 1959.



United States
COURT OF APPEALS
for the Ninth Circuit

ALEXANDER L. VINCZE, an Individual; O. K. TRANSFER
CO., a Corporation; PIONEER TRUCK RENTALS, INC., a
Corporation; and DRIVERS SERVICE, INC., a Corporation,
Appellants,
vs.

INTERSTATE COMMERCE COMMISSION, *Appellees,*
BEND-PORTLAND TRUCK SERVICE, ET AL.,
Intervenor-Appellees.

BRIEF OF APPELLANTS

ALEXANDER L. VINCZE, an Individual; O. K. TRANSFER
CO., a Corporation; PIONEER TRUCK RENTALS, INC.,
a Corporation; and DRIVERS SERVICE, INC.,
a Corporation

*Upon Appeal from the District Court of the United States for the
District of Oregon.*

JOHN M. HICKSON,
C. J. STOCKLEN,
Failing Building,
Portland 4, Oregon,
R. B. MAXWELL,
First Federal Savings & Loan Building,
Klamath Falls, Oregon,
Attorneys for Appellants.

C. R. LUCKEY,
ROBERT F. CARNEY,
U. S. Court House,
Portland 4, Oregon,

WM. L. HARRISON,
Bureau of Inquiry and Compliance, I.C.C.,
602 Sheldon Building,
461 Market St.,
San Francisco 5, Calif.,
Attorneys for Appellee.

WM. ADAMS,
Pacific Building,
Portland, Oregon,
Attorney for Intervenor-Appellees.

FILED

MAR 14 1959

PAUL P. O'BRIEN, CLERK

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United States
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ALEXANDER L. VINCZE, an Individual; O. K. TRANSFER
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a Corporation; and DRIVERS SERVICE, INC.,
a Corporation

*Upon Appeal from the District Court of the United States for the
District of Oregon.*

JURISDICTION OF THE COURT

The Jurisdiction of the District Court was founded upon Part II of the Interstate Commerce Act, more particularly Sections 204(a) and 222(b) thereof (Title 49, U.S.C.A. 304(a) and 322(b)).

The Jurisdiction of the Circuit Court of Appeals is founded upon Section 1289, amended, of the Judicial Code (28 U.S.C.A. Section 225(a)(1)). This appeal has been taken from a final decision of the District Court of the United States for the District of Oregon within the meaning of Section 128 of the Judicial Code.

STATEMENT OF CASE

This suit was instituted by the appellee, Interstate Commerce Commission, to enjoin the appellants from in any manner or by any device, directly or indirectly, transporting or causing to be transported property subject to the Interstate Commerce Act upon public highways for compensation as a common or contract carrier unless and until such time, if at all, as there is in force and effect a Certificate of Public Convenience and Necessity or a Permit or other appropriate authority issued by the Interstate Commerce Commission authorizing the appellants to engage in such transportation and operations.

A simplified version of the above statement is that the appellant, Pioneer Truck Rentals, Inc., a corporation, hereinafter called "Pioneer," rents trucks to companies, which companies have goods or material that is subject to Interstate Commerce Commission regulations (there are certain goods that are not subject to such Interstate Commerce Commission regulations and these are hereinafter called "exempt commodities"), and Drivers Service Inc., a corporation, hereinafter called "Drivers Service," makes available to such companies drivers for the equipment rented by Pioneer and other services. It is to be noted that at the time of the inception of this suit, the appellant, Alexander L. Vincze, owned stock in both corporations. This suit was instituted on November 16, 1954, however within four (4) months after the origin of this suit, Alexander L.

Vincze had disposed of all of his stock in Drivers, and *there were no interlocking stockholders.*

The other services heretofore mentioned included the opportunities for the lessees to have public liability and property damage insurance, as is required by the laws of the State of Oregon for transportation over the highways of such state, and insurance for its cargo. In all cases of such insurance, which was usually obtained, a rider was attached to the policies of insurance listing the lessee company as a named insured under the public liability and property damage and as a named insured of the cargo carried at the time of the lease of the equipment by Pioneer.

At no time was any lessee required to use the driver provided by Drivers Service or any of the other services made available by such Drivers Service.

All of the leases in question in this case were trip leases in interstate commerce, or a lease of a vehicle from a point in one state to a point in another state, and in one direction only.

There has never been any contention by the Government, nor could there be, that the use of private vehicles by individuals, other than for safety precautions, which laws are not in point, is not covered by the Interstate Commerce Act, nor is the use by private individuals of leased motor vehicle equipment for carrying their own merchandise governed by the Interstate Commerce Act, except as specified, nor is the leasing of *motor vehicle equipment* by individuals governed by the Interstate Commerce Act or its regulations. There-

fore the main question on this appeal is whether the lessee had control of the leased vehicle, or whether there is any substantial evidence upon which the Honorable Gus J. Solomon could find that the lessee had in fact no control over the vehicle, or to place the question conversely, whether the appellants always had control over the vehicle.

The reason for the designation of the opinion as being that of the Honorable Gus J. Solomon is that this suit was originally tried by the Honorable James Alger Fee, sitting as a trial judge, who found that the Interstate Commerce Commission had not presented sufficient evidence to warrant the granting of an injunction on the 24th day of August, 1956, and granted to the Interstate Commerce Commission certain rights, however; a pertinent portion of Judge Fee's decision, reads as follows:

"There will be a specific reservation that at any time within the year ending December 31, 1957, more proof of an illegal activity is obtained to the satisfaction of the Commission involving Vincze or the other defendants, the cause will be reopened for further proceedings." (Emphasis supplied)

The trial was reopened before the Honorable Gus J. Solomon on the *4th day of August, 1958*, and the additional evidence which is set forth in the transcript of testimony was presented. The opinions of the Honorable James Alger Fee and the Honorable Gus J. Solomon are parts of the record in this case.

SPECIFICATION OF ERRORS

The District Court erred in the following respects:

1. In holding that the appellants, acting together, and in concert with each other, and each of them severally and jointly have been and now are continuing to engage in the interstate transportation of property by motor vehicle for compensation without there having been issued to any of the appellants, a Certificate of Public Convenience and Necessity or Permit by the Interstate Commerce Commission to engage in such operation.

2. In finding that the agreements entered into by the appellants with various lessees, who had been designated as shippers, were fictitious forms of rental agreements for the shipping of property.

3. In entering findings of fact which there was not sufficient evidence to substantiate as a matter of law, and in basing conclusions of law and a permanent injunction thereon.

SUMMARY OF ARGUMENT

1. Leases of transportation equipment pro hac vice have been recognized since the beginning of transportation, and there is no legal difference between the chartering of vessels and the leasing of motor vehicle equipment. The making available of operators and other services, as was done in the instant case, is insufficient to alter the lease and change it from a charter to a contract of affreightment.

U. S. v. Daniel Shea, 152 U.S. 178, 189, 38 L. Ed. 403, 407, 408;
 Judson v. Beehive Motor Co., 136 Ore. 1, 294 P. 588, 297 P. 1050;
 80 CJS, Shipping, Sec. 34(a);
 People v. Carmona, 79 Cal. App. 159, 251 P. 315, 317;
 State v. Tinnin, 64 Utah 587, 232 P. 543, 545, 43 A.L.R. 46;
 Kinney v. Kinney, 230 Ala. 588, 161 So. 798, 800;
 Town & Country Advance Co. Ltd. v. Provincial Bank of Ireland, Ltd. (1917), 2 I.R. 421, per Campbell, C.J. at P. 427;
 Funk & Wagnalls New Standard Dictionary;
 Websters New International Dictionary.

2. The portion of the Interstate Commerce Act that governs the operations of water carriers specifically includes the leasing of equipment. Since the leasing of motor equipment is omitted in the portion of the Interstate Commerce Act that controls the leasing thereof, such omission was intentional, and under the doctrine of construction in *pari materia*, the Court should not be asked to create such legislation.

U.S.C.A. Title 49, Sec. 902(e);
 59 C.J. Statutes, Sec 620;
 82 CJS Statutes, Sec. 328;
 Texas & Pacific Ry. Co. v. I.C.C., 162 U.S. 197, 40 L. Ed. 940, 945.

3. The operations of these appellants as a private carrier were in accordance with the laws of the State of Oregon and the regulations of the Public Utilities Commissioner of the State of Oregon, and unless this Court holds these statutes and regulations unconstitutional, the operations are legal.

Sections of Oregon Code:

767.015, 767.105, 767.195, 767.045, 767.150,
767.350,

Rules of the Public Utilities Commissioner of
Oregon, 5.18 D, 521.

4. Since these appellants never assumed the duties and responsibilities of a common carrier, and in fact, specifically did not assume such duties and responsibilities, they cannot be construed to be a common carrier.

13 C.J.S., Carriers, Sec. 71;

The Doyle, 105 F.2d, 113, 114;

The Thomas P. Beal S. L. Jones & Co. v. Bennett,
et al, 11 F.2d 49, 53,

ARGUMENT

The inception of the trip leases, or charters, involved in the instant case began with the execution of the Pioneer Truck Rentals agreement (Pl. Ex. No. 3). An examination of this exhibit will reveal that the lessee rents a vehicle at point "A" and agrees to return the vehicle at point "B." This is not a round-trip lease, but is usually from point to point or from city to city in interstate commerce. Under this agreement the lessee or charterer loads the vehicle. The rate under this agreement is by the mile and is, as the evidence shows, generally twenty-one cents (.21) per mile. It is to be noted that there is a time limit on the rental of this vehicle and that *there is no extension of the time without the express permission of Pioneer Truck*. The agreement also provides that the lessee shall pay the cost of repairs and also agrees to hold Pioneer harmless.

The agreement further provides that the charterer assumes sole responsibility for the equipment and agrees to operate the same in accordance with all laws and agrees to return the equipment free from all liens and charges.

Under the Drivers Service agreement (Pl. Ex. No. 4), which is executed at the same time by the lessee or charterer, Drivers Service agrees to pay all costs of repairs due to the negligence of the drivers. (It is to be noted that this agreement does not cover any other repairs.) Drivers Service also agrees to pay all extra costs due to the fault of Drivers Service, but does not cover any other extra costs. Drivers Service also agrees to furnish all labor for moving the equipment from place to place. In other words Drivers Service makes drivers available for the movement of this equipment. There is no requirement in either the Pioneer Truck Rental agreement or the Drivers Service agreement that these drivers must be used. It is also to be noted in connection with furnishing the drivers for the moving of the equipment that Drivers Service *specifically does not cover loading and unloading.*

Drivers Service also agrees to make necessary reports and to pay proper charges and taxes, including mileage and fuel taxes. As will be noted later under another assignment of error, it was and is the duty under the Oregon law for Pioneer Truck Rentals to pay such taxes as were due the State of Oregon and any payment by Pioneer or by Drivers Service was paid either by Pioneer under their regular duty or paid by Drivers Service in behalf of Pioneer.

Drivers Service also agreed to save harmless and defend the lessee under certain circumstances. Since in any accident involving the public, questions could arise as to the liability of Pioneer, the charterer, or Drivers Service, public interest requires a definite party defendant. (Under the law of the State of Oregon the presumption of control of a vehicle arising out of the ownership thereof is overcome, as a matter of law, when a written lease is entered into for the vehicle and there is not a scintilla of evidence upon which the owner can be held responsible. See *Judson v. Beehive Motor Co.*, 136 Ore. 1, 294 P. 588, 297 P 1050. This is also the law in the majority of jurisdictions in the United States.) Since Drivers Service made available drivers for the movement of this vehicle from place to place, such provision is necessary for the protection of the public.

Drivers Service also agreed to insure itself and the owner with public liability and property damage insurance. It is to be noted that *in all cases the charterer was added on a rider to the policy, as an additional insured.* (Solomon Tr. 226-227, 231. *Rhodes Deposition*, (Pl. Ex. 139), pages 10 and 11).

Drivers Service further agreed to comply with all traffic regulations. The sole importance of this provision is that the driver merely agreed not to violate traffic laws; any other violations are the responsibility of the charterer.

Drivers Service further agreed to return the equipment free and clear from all liens *except* nature and ownership of the goods transported. This is called to

the Court's attention as there is no restriction by Pioneer or Drivers Service *as to the character or quantity or ownership of the goods transported in the vehicle*. The charterer leased the entire vehicle; could load it with as little or as much as he desired, *either his property or the property of others*, or property requiring special permits to be transported in interstate commerce, for example, explosives.

Drivers Service was also not responsible for loads in excess of the gross load limit permitted by the various laws of the states in which the vehicle might be operated. Also Drivers Service was not responsible "for anything not connected with the physical operation of the equipment and shall be reimbursed * * * for any expense it may incur in connection with such other matters."

Also Drivers Service was not under any duty to continue a trip after any illegality became known and could cease to continue such trip until such illegality became corrected. Assuming, which is not beyond the realm of possibility, that a charterer rented a vehicle from Pioneer and obtained the services of Drivers Service and loaded the vehicle with explosives (which under the evidence would not be known to the driver of the equipment), and the charterer had no Permit for the transportation of explosives, could this Court hold Pioneer or Drivers Service, or both, or any of the appellants guilty of transporting explosives without a license?

To summarize, all of the provisions of the Pioneer Truck Rental agreement and the Drivers Service agree-

ment, assuming for this appeal, that they were parts of the same document, are consistent with a demise or charter of the vehicle, and are not consistent with a contract of affreightment. No service was furnished by Drivers Service that was inconsistent with a demise or charter *pro hac vice*. 80 C.J.S., *Shipping*, Sec. 34(a), p. 688, reads as follows:

“(a) General—The presence of express words of letting or demise indicates that the charterer is, by the charter party, the owner *pro hac vice*.

“The presence of express words of letting, or demise indicates that the charterer is, by the charter party, the owner *pro hac vice*. Language appropriate to the demise of the vessel is not conclusive, but has considerable weight; the effect to be given to such a provision essentially depends on all the terms of the instrument taken together. Thus, a special ownership does not necessarily pass, although the terms of the instrument are “let and hired,” and the hirer agrees to pay a gross sum. The terms “charter”, “let”, “freighting”, “rent”, and “hire” have been held not to be words of demise, in this connection.

“Stipulations as to ‘delivery’. The charterer’s agreement to deliver the vessel up to the owner after the performance of the voyage has been regarded as furnishing evidence of a demise, but the use of such terms as “acceptance,” “employ,” and “delivery,” in the charter party, although indicative of a demise of the vessel, is not absolutely irreconcilable with the contrary result. Such provisions are, for this purpose, to be construed in connection with the rest of the charter terms and given the effect appropriate to such construction.”

In the instant case there is no question but that the charterer had the absolute right of selection of the place for discharge of the cargo and that the charterer

had the sole right to load the equipment and that the charterer had the right to employ the equipment in any kind of carriage, either of his own goods or the goods of others, between fixed limits, and that the charterer had the right to discharge any operator of the equipment for disobedience and the right to hire others and that the charterer was under the duty to maintain the equipment for all repairs other than those due to the negligence of the drivers, and that Pioneer Truck or Drivers Service, having once demised the equipment, had no right to interrupt the service at any time prior to the termination of its journey.

The entire vehicle was demised in each instance. The charterer could load the vehicle with his own merchandise or the goods of others, and with any quantity of goods. Under these circumstances there is no evidence upon which Judge Solomon could find that the contracts in question constituted contracts of affreightment rather than charters *pro hac vice*.

In the case of *United States v. Daniel Shea*, 152 U.S. 178, 38 L. Ed. 403, 407, 408, the opinion of the Court reads:

"The contract is for vessels, and not for any use of them. The vessels are to be furnished to the government; they are to take the place of other vessels presumably belonging to the government, engaged in a certain service, and if petitioner fails to furnish the needed vessels the government may go elsewhere and hire them. There is no stipulation which in terms, or by implication, casts upon the petitioner the management or control of any vessel accepted by the government. That the time for which the vessels were to be employed might be limited by

the wishes of the government does not affect the question as to whether, while so employed, they were to be under its exclusive control and management. A *demise may be for a day as well as for a year*, and may be terminable at the will of the lessor. The pay, by the 4th article, was to be 'for each vessel employed.'

"Not only this, but the conduct of the parties in the execution of the contract removes all obscurity as to its scope and meaning. As the findings show, the vessel, the *James Bowen*, was furnished by petitioner, and was accepted and used by the defendants. During the time of its use it was under the exclusive management and control of the defendants. The very condition resulted which is the purpose and effect of a demise—the transfer of the exclusive possession, management, and control. The vessel was not, when injured, returned to the petitioner, but when the repairs were finished, "resumed work". It is insisted by the defendants that there was no demise because, as claimed, the petitioner did not contract to furnish one vessel for any length of time, and could, if he wished, change vessels. It is doubtful whether that is a correct interpretation of the instrument, and whether it was in the power of the petitioner, after a vessel had been tendered and accepted by the government, to substitute another therefor. But even if it were so, the substituted vessel would pass into the exclusive possession of the government, the same as the vessel for which it was substituted.

"We think little significance is to be attached to the provisions in reference to *furnishing a crew* or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control. If it be said that the clause requiring the government to furnish fuel was unnecessary in case there was a demise, it may, also in like manner, be said that the further clause as to the petitioner's furnish-

ing a crew was unnecessary if he was to retain the management and control. Any possible inference from one clause may be set off against a different inference from the other, but neither of them destroys the significance of the operative words of transfer, nor outweighs that of the action of the parties in the execution of the contract." (Emphasis supplied)

The emphasized language of the Court is quite similar to the facts of the instant case.

In the case of *The Doyle*, 105 F.2d 113, the opinion of the Court read at page 114 as follows:

"The entire capacity or full reach doctrine is well established. *The William I. McIlroy*, 37 F. 2d 909, D.C.E.D.N.Y.; *Warner Sugar Refining Co. v. Munson S. S. Line*, 23 F. 2d 194, D.C.S.D.N.Y.; *The C. R. Sheffer*, 2 Cir., 249 F. 600, 601; *The Maine*, 161 F. 401, D.C.S.D.N.Y.; *The Fri*, 2 Cir., 154 F. 333."

In this case the Court applied the full reach doctrine to a barge. It is submitted that if the full reach doctrine applies to a barge, it is equally applicable to a trailer and as previously noted, the charterer in the instant case never leased less than an entire unit.

In the case of *The Thomas P. Beal*, 11 F.2d 49, at page 53, the Court held as follows:

"The terms of the charter party make it certain there was a letting of the ship as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee; whereas, in the latter, the relation is that of carrier and shipper. *Carver* (4th Ed.) 112; *The Barnstable*, 21 S. Ct. 684, 181 U.S. 469, 45 L. Ed. 954. According as it is one or the other the question arises, whose agents wrought the

injury, and there is suggested the inquiry put by Lord Esher in 1 Q. B. 258; 'When is a captain the owner's captain?' Transposing the question, we ask: 'When is the captain the charterer's servant?' Directing these inquiries to the case in hand, it is clear that, within the law of *The Santona* (C.C.) 152 F. 516, 518, opinion by Judge Hough, while the owner did not surrender possession or control or command or navigation of the ship, '*he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship (was) the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew (were) the servants of the charterers.*' And so the parties in this case construed the charter party, for it is perfectly clear that the charterer, first at one port and then at another and finally at San Francisco, *booked the freight, designated the places of stowage, did the stowing itself through its own stevedores, and assumed all responsibility therefor.* On the issue between the charterer and the ship we find the charterer liable." (Emphasis supplied)

The findings of fact and conclusions of law by Judge Solomon have not been set forth in detail. The Court will recall that at the time of the argument on the Motion for Stay of Execution in this case, one of the attorneys for the appellees raised the question that no objection had been taken to the form of the Findings of Fact and Conclusions of Law. At that time counsel for the appellants advised the Court that due to the necessity of presenting the Motion for a Stay at the earliest possible moment, in order to make any appeal

efficacious, there was insufficient time for the appellants to object to the form of the Findings of Fact and Conclusions of Law. Consequently, any failure by the appellants to object to the form should not be deemed a waiver and acceptance of the form by the appellants. To anticipate an argument that the Findings of Fact, if such be the fact, by the appellees that these contracts were "fictitious," some examination of the record is necessary. "Fictitious" has been variously defined; some of the definitions reading as follows:

"Fictitious. Founded on a fiction; having the character of a fiction; pretended; counterfeit. *People v. Carmona*, 79 Cal. App. 159, 251 P. 315, 317; *State v. Tinnin*, 64 Utah 587, 232, P. 543, 545, 43 A.L.R. 46. Feigned, imaginery, not real, false, not genuine, non-existent. Bill alleging that amount of mortgage sought to be cancelled was "fictitious", held to allege that the mortgage was without consideration. *Kinney v. Kinney*, 230 Ala. 588, 161 So. 798, 800."

"The . . . cases seem to establish this, that in order to have a fictitious payee within the meaning of the section (S. 7 of the Bills of Exchange Act, 1882), you must always find that the drawer knew and intended that the payee was to be an unreality, but that if his intention was to have a real payee and a real transaction, there can not be a fictitious payee so far as the drawer is concerned." *Town & Country Advance Co. Ltd. v. Provincial Bank of Ireland, Ltd.*, (1917) 2 I.R. 421, per Campbell, C.J. d p. 427.

"Fictitious. 1. Belonging to or of the nature of fiction; created or formed by the imagination; having no real existence; as a fictitious character. 2. Substituted for something real; counterfeit; false, assumed; as a fictitious name." (*Funk & Wagnalls Dictionary of the English Language, 1945 Edition*)

"Fictitious. 1. Feigned; imaginary; pretended; not real; fabulous; counterfeit; not genuine; as fictitious fame. 2. Of, pertaining to, or like fiction. 3. Arbitrarily devised; as a fictitious standard. 4. Assumed arbitrarily or conventionally to be genuine." (*Websters New International Dictionary, Second Edition, 1950*)

Presumably this is how Judge Solomon used the word when referring to the above demises. In order to so hold, Judge Solomon would be required to hold that all of the contracts of the type as set forth, which were entered into by any of the witnesses, were entered into with an intention of the parties not to have the documents constitute a real transaction. It is submitted that the record is entirely lacking in either direct evidence or any evidence of conduct of the parties that all of the parties to any contract or contracts did not intend for those contracts to be the binding contracts between the parties.

The following is a brief summary of all of the oral testimony. (That part which was heard before the Honorable James Alger Fee will be referred to as the "Fee transcript" (Pl. Ex. No. 143) and that part which was heard before the Honorable Gus J. Solomon will be referred to as "Transcript," and the remainder will be referred to as "Depositions.")

Fee Transcript:

Mr. Youngblood, Office Manager of *Gerlinger Carrier Co.*, manufacturer of lift trucks, testified:

" * * * Called and asked if we could have a

truck to deliver a piece of equipment into California. * * * (Tr. 7).

Q. And for that service you have *leased* vehicles from Pioneer Truck Rentals?

A. Yes." (Tr. 10) (Emphasis supplied)

Mr. Heaton of Heaton Steel & Supply Company, testified that a truck would be furnished to him with or without a driver or insurance (Tr. 23).

" * * * I wanted a truck on such and such a date at a certain time. * * * " (Tr. 26).

Mr. McCormick of the Highway Lumber Company, testified:

" * * * Was informed we could lease a truck from Pioneer and get a driver from Drivers Service" (Tr. 31).

Mr. Collins of the Medford Lumber Company, testified:

" * * * They would rent us a truck and we could call the Service organization for a driver. * * * " (Tr. 33).

Mr. Holst of the W. P. Fuller Company, testified:

" * * * Never used the service. * * * " (Tr. 37).

Mr. Sheedy of the Hyster Co., testified:

" * * * Never used the service. * * * " (Tr. 41).

Mr. Mayfield, truck driver, testified that the truck rental was the same as a U-Drive (Tr. 24).

Mr. Steward, truck driver, testified:

" * * * Both contracts have to be signed by ourselves and the shipper * * * " (Tr. 56).

Transcript:

Mr. Fred Tolan, Freight Traffic Consultant for several hundred industries, advised the companies retaining him as to advantages of the service.

“ * * * Routes and drop-offs at direction of owner of goods * * * ” (Tr. 29).

“ * * * We wanted to be able to control the drivers as to the routes they would use and all other phases of the operation * * * ” (Tr. 30).

“ * * * The rates charged were so much per mile regardless of the amount of weight or space. * * * ” (Tr. 32).

Mr. Lundahl of Van Waters & Rogers, testified:

“ * * * We could put on our own drivers if we wanted to. * * * ” (Tr. 57).

Mr. Lees, Grain merchandiser: (This testimony is not repeated as the products hauled were exempt products).

Mr. Allen of Blue Lake Packers, testified:

“ * * * Hauled our own merchandise * * * ” (Tr. 78).

Mr. Guthrie of the Brown Company, manufacturers of bituminized fiber pipe, testified:

“ * * * We instructed the drivers where to load, where to go, and what routes to follow. * * * Made telephone calls to consignees and changed destination. * * * ” (Tr. 88).

“ * * * The main interest of the Brown Company was obtaining equipment suitable for handling the particular shipment. * * * ” (Tr. 89).

Mr. Beckstrom, of the Bate Lumber Company, testified:

“ * * * Have shipments of plywood from Merlin, Oregon to California. * * * ‘X’ dollars for use of truck to a certain destination and ‘X’ dollars for the use of the driver to a certain destination. * * * Made arrangements in behalf of consignee. * * * ” (Tr. 97).

“We could load what we wanted. There was no difference per mile for the rental of the equipment whether it was light or loaded. * * * ” (Tr. 103).

Mr. O'Connor, North Pacific Lumber Company, testified:

“ * * * Did business with Pioneer as they had flat beds available when we needed them. * * * ” (Tr. 111).

“ * * * Paid higher rates for such equipment. * * * ” (Tr. 111).

Mr. Singleton, Superintendent of Motor Regulations in the office of the Public Utilities Commissioner of the State of Oregon, issued identification tags (Tr. 117).

“ * * * Issued to the carrier, that is, the person using the vehicle. * * * The lessee. * * * ” (Tr. 117). (Emphasis supplied).

“ * * * Carrier secured their own permits. * * * ” (Tr. 118).

“ * * * Insurance covered the lessee as required by law. * * * ” (Tr. 120).

“ * * * State accepted the Highway Use Tax from Pioneer. * * * ” (Tr. 121).

Mr. Payne, driver for Magee Truck Service, testified:

“Currier in Los Angeles arranged freight for this driver to haul on a northbound load, * * * ” (Tr. 129). (Evidence might be construed as acting as a broker, but certainly not as a carrier.)

Mr. Moon, also a driver for *Magee Truck Service*, testified to the same effect.

Mr. Schmutzer of *Magee Truck Service*, testified that the movement to which he was a party was just a normal one on his part with Schmutzer paying a 10% commission (Tr. 138).

Mr. Clendenin of *Contract Carrier Service* testified they had contract carrier authority from the Interstate Commerce Commission (Tr. 144).

“ * * * I was paying Pioneer a commission on a fee based upon the gross for these services which they were rendering for using their corporate organization, for using their forms, for using their name and their method of doing business. * * * ” (Tr. 153).

Mr. Burton, former employee of *Pioneer Truck Rentals* at *Portland, Oregon*, testified:

“ * * * Went out to get short term leases on trucks, rather than solicit freight. * * * ” (Tr. 163).

Mr. Freuy, owner-operator of a truck, was charged 10% by *Pioneer Truck Rentals* for getting loads to keep him on the highway. * * * (Tr. 173).

“ * * * Was paid in some instances for empty miles. Followed shipper's instructions. * * * ” (Tr. 175).

Mr. Wilson, owner-operator of a truck, testified:

“ * * * Pioneer received a commission for getting the truck leased out. * * * (Tr. 181).

“ * * * Paid Pioneer 10% of the gross for operational expenses. * * * ” (Tr. 186).

Mr. Goldsby, truck driver for Pioneer Truck Rentals, testified he drove truck for Pioneer which truck was owned by Orville J. Clark of Eugene, Oregon (Tr. 189).

“ * * * Quit by calling Mrs. Clark. Was hired by Williams, the other driver of the truck. * * * ” (Tr. 190).

Mr. Ford testified he had been a driver for Pioneer of a truck owned by Paul Breithaus. * * * (Tr. 196).

Mr. Ceglia testified he was the owner of a truck he leased to Pioneer. * * * Quit because he could not hire and fire his drivers. * * * (Tr. 208).

Mr. Johnson, owner and operator, testified. There is at present a lawsuit and counter-claim between Mr. Johnson and Pioneer Truck Company, therefore his testimony could hardly be called disinterested.

Mr. Sidebottom of Oliphant & Bates Insurance Company, as previously indicated, testified the charterers of the vehicles became additional insureds under the public liability and property damage (Tr. 226, 227). On any cargo insurance, there was written notice of insurance to the other party (Tr. 231, 233).

Depositions:

(The following depositions were available at the time of the trial before Judge James Alger Fee.)

Mr. Gobrecht of the U. S. Gypsum Company (Pl. Ex. 9-13) stated separate drivers permitted (P. 24).

“ * * * We would be required to pay for the use of an empty truck. * * * ” (P. 32).

“ * * * Driver would be acting as our agent. * * * ” (P. 35).

Mr. Farrell, independent traffic agent (Pl. Ex. 9-13), stated he only used Pioneer for the hauling of exempt commodities.

Mr. Pihl of Pacific States Steel Corp. (Pl. Ex. 14) stated the operation was different than that of a common carrier. * * * (P. 30). Specified tarpaulin coverage of merchandise. * * * (P. 33).

Mr. Illing of the Columbia Geneva Division of U. S. Steel, stated (Pl. Ex. 15):

“ * * * All bargaining ended up with flat total rate per haul. * * * ” (Tr. 8).

Mr. Spaich, probably the principal stockholder and officer of *Pacific States Steel Company* (Pl. Ex. 16, Fee trial), testified he rented the equipment and engaged the services of drivers and delegated certain duties to Drivers Service, Inc. He knew his company was a private carrier and realized his responsibilities for the cargo and for the operation of the trucks.

The following are depositions taken since the trial of the instant case before Judge Fee and were introduced in evidence in the trial before Judge Solomon.

Mr. Jauregui, operator for Drivers Service (Pl. Ex. 137), testified he answered calls for drivers.

Mr. Trestrail, Office Manager of Metalcraft Products Co. (Pl. Ex. 140), stated:

“ * * * When we rent a truck, we load it. *The amount of weight is our responsibility.* * * * ” (Emphasis supplied) (P. 14).

“ * * * In other words you are operating the truck; it is up to you to see that it is loaded proper-

ly, to give you the most as you mention it, pounds per hundred dollars per hundred value. * * * ” (P. 14-16).

“ * * * Yes. * * * ” (P. 16).

Mr. Rhodes of the Robert W. Lacey Company (Insurance) (Pl. Ex. 139), stated:

“ * * * Policy was issued in these names, Pioneer Truck Rentals Inc., Drivers Service Inc., O. K. Transfer, A. Vincze and Grant Beeney. Endorsements are for certain values to certain people. * * * ” (P. 5).

“ * * * The liability and property damages policy is over 70 pages long. * * * ”

Q. What are all those pages about?

A. Endorsement. Adding additional assureds or adding the assured you might say. (P. 10-11).

Q. Now, what is the nature of the endorsements on the policy?

A. They are assureds, as far as we are concerned.” (P. 10-11).

Mr. Currier, employee of Pioneer Truck Rentals in Los Angeles (Pl. Ex. 136), gave evidence that he did solicit freight.

Mr. Stombs, former employee of Pioneer Truck Rentals (Pl. Ex. 138), who was discharged, stated it was his duty to sell truck rental service (P. 4). (A letter to Anaconda Wire & Cable Company (Pl. Ex. 114) * * * Offered a truck for 22¢ a mile. Letter stated that Drivers Service would supply reliable and thoroughly experienced drivers. * * * (P. 7-8).

Mr. Ransom, restaurant owner and former truck owner and operator (Pl. Ex. 134), testified he had cir-

culated information in Northern California obtained from Fred Tolan but did no business (P. 7-12).

Mr. Damon, presently employed by *Pacific Inter-mountain Express* (Pl. Ex. 135), testified he was hired by Al Vincze as a driver (P. 5). * * * Had Drivers Service and Pioneer Truck Rental contracts signed at the same time. In present employment never comes in contract with shippers. * * * (P. 16).

The above is a brief summary of the oral testimony, good, bad and indifferent which was available to the Honorable Gus J. Solomon. It is respectfully submitted that there is not only no substantial testimony upon which any finding could be based that the agreements signed were "fictitious," but the evidence conclusively proves to the contrary, i.e., that these arrangements were valid, represented all of the agreement between the parties and as a matter of law, constituted charters *pro hac vice*.

* * *

* * *

There is an additional ground or basis for the opinion that the trial court was in error in determining that the operations of these appellants were that of a common or contract carrier. It is fundamental law that all legislation pertaining to a particular subject is to be considered as a whole. This is particularly true of the Interstate Commerce Act as it covers the entire field of transportation. In the case of *Texas & Pacific Railway Company, Appellant, v. Interstated Commerce Commission*, 162 U.S. 197, 40 L. Ed. 940, 945, the Supreme Court in construing this Act said:

"It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the the states and territories as that going to or coming from foreign countries."

"In a later part of the section it is declared that 'the term "transportation" shall include all instrumentalities of shipping or carriage.' "

In the portion of the Interstate Commerce Act which governs the operation of water carriers, the control of leased equipment, under factual circumstances that would be strikingly similar with the case at bar, the Act provides as follows:

"(e) The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) of this section and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation (under a charter, lease or other agreement) of a vessel, to a person other than a carrier subject to this chapter and chapters 1 and 8 of this title, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'. Whenever the Commission, upon its own motion or upon application of any interested party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in the Interstate Com-

merce Act, it shall by order exempt such person or class of persons from the provisions of this chapter for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity or hearing." *U.S.C.A. Title 49 § 902(e)*.

It is apparent that the operations of the appellants would be specifically covered if they were involved as water carriers.

Since Congress did not enact similar legislation in the provisions of the Interstate Commerce Act that control motor transportation, the Interstate Commerce Commission should not request this Court to judicially enact such legislation.

There are a host of cases holding the statutes that have a common purpose are to be construed in *pari materia*. See *59 C.J. Statutes, Sec. 620*, on this subject, which reads as follows:

"620(2)—Statutes Relating to Same Subject Matter—(a) In General. Statutes in *pari materia* are those which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose, and although an act may incidentally refer to the same subject as another act, it is not in *para materia*, if its scope and aim are distinct and unconnected. It is a well established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with

it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject matter has been changed or modified from time to time. In other words, in determining the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation."

The appellees are asking this Court, as they did the trial court, to supply an omission to this statute. In this connection, again, there are a host of cases, many of which are referred to in 82 C.J.S., *Statutes*, Sec. 328, which section reads as follows:

"328. Matters Omitted.

"As a general rule, the courts cannot supply omissions in a statute.

"Since the court in construing a statute must ascertain and give effect to the legislative intent as expressed in the language of the statute, as a general rule the court cannot, under its power of construction, supply omissions in a statute, especially where it appears that the matter may have been intentionally omitted."

As this Court is well aware, the Interstate Commerce Act was established quite sometime ago. At various times the Statute has been amended. The provision relating to motor vehicle contract carriers was amended as recently as 1957. If this problem is of growing importance to the Commission and if some regulation of it is deemed necessary, other than by judicial legislation, it would seem that members of the Commission would

be aware of all of the provisions of the Interstate Commerce Act which *en toto* is capable of being read in a comparatively short time, and could recommend to Congress the remedy of any deficiencies deemed necessary. The same reasoning applies to Congress. This is an additional reason why the decision of the trial court is erroneous and requires reversal by this Court.

* * * * *

It has been mentioned previously that except for laws and rules governing safety, no exercise of authority has been made concerning the interstate operation of private carriers. In the instant case the appellant, Pioneer Truck Rentals, Inc., is a private carrier duly licensed by the State of Oregon; *ORS 767.015* defines "private carrier" as follows:

"As used in this chapter the term:

"(2) 'Private carrier' means any person not included in the term 'common carrier' or 'contract carrier' who transports by motor vehicle property of which he the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in the furtherance of any commercial enterprise. Ownership of the property transported shall not be accepted as sufficient proof of a private carrier operation if the carrier is in fact engaged in the transportation of property for hire, compensation or remuneration, or if such transportation operations are conducted for profit and not merely as an incident to a commercial enterprise."

ORS 767.045 reads as follows:

"Application of chapter to interstate and foreign commerce. This chapter applies to interstate and foreign commerce, except in so far as it may be in

conflict with the provisions of the Constitution and the laws of the United States.”

Therefore unless this Court holds that the Interstate Commerce Act governs the operations of these appellants in interstate commerce or unless the Oregon law is unconstitutional, the operations of these appellants is legal.

Section 767.105 of the Oregon Revised Statutes reads as follows:

“(1) No person shall operate any motor vehicle on any highway in this state as a common carrier, contract carrier or private carrier in the transportation of persons or property or both without first applying for and obtaining, in addition to any license required by any other law, a permit from the commissioner covering the proposed operation.”

It is admitted in the instant case that the appellant, Pioneer had a permit to operate as a private carrier.

ORS Section 767.150 reads as follows:

“Issuance of permits to private carriers. Upon receipt of the information in writing required by the application form for permits in that class and in compliance with the law and the rules and regulations of the commissioner, permits shall be issued to private carriers, conditioned that the proposed operation will not be attended with substantial damage to the highway or danger to the users thereof, to adjacent property or facilities or to the public. The applicant is entitled to a hearing by the commissioner if his application has been declined by the commissioner.”

ORS 767.195 provides that all carriers (and this includes private carriers) have liability insurance. In this

connection it is called to the Court's attention, that in all cases every charterer had liability insurance by means of a rider to the policy issued to certain named assureds, including these appellants.

Some mention has been made of the payment of mileage taxes by these appellants. ORS 767.350 reads as follows:

"Fees for persons leasing or renting motor vehicles to others to transport property or more than seven passengers. Every person to whom a permit is issued under ORS 767.160 shall pay the fees prescribed by ORS 767.325 to 767.340, unless provision is made, with the approval of the commissioner, whereby such fees shall be paid by the lessee or user of such motor vehicles."

It is the contention of these appellants that under and by virtue of the terms of this statute, it was the duty of these appellants to pay the mileage taxes, whether or not they were licensed as a U-Drive.

It is called to the Court's attention that Mr. Singleton, an employee of the Public Utilities Commissioner of the State of Oregon, testified that in all instances now under examination by this Court, that temporary passes were issued to charterers of the vehicles. These passes were issued by the Public Utilities Commissioner pursuant to *Rule 5.18d*, which rule reads as follows (all following rules are set forth in the Brief of Howard Morgan, Oregon P.U.C.):

"D—Passes.

1. In cases of emergency, when the proposed operation does not exceed ten days in duration, a *temporary pass* in lieu of identification plates will be issued.

2. Such pass must be carried in the vehicle for which it is issued and be available for inspection by the Commissioner, his representatives or by any other authorized person at all times." (Emphasis supplied)

Rule 5.21 of the Public Utilities Commissioner of Oregon reads as follows:

"Leases of Vehicles.

A—No vehicle held under lease will be approved for operation until a copy of such lease is approved by the Commissioner.

B—All leases must contain:

1. The full names and addresses of the negotiating parties;
2. A complete description of each vehicle involved;
3. Provision that the sole possession, responsibility and control of each vehicle for the entire term of the lease is to reside with the permittee;
4. Provision that the vehicle will at all times be operated subject to the exclusive direction and supervision of the permittee;
5. *If the owner or an employee, agent or servant of the owner of the vehicle is engaged by the permittee to operate the vehicle, provision that the permittee is to be given complete control over such person and the operation of the vehicle while so engaged;*
6. Provision that the permittee assumes full responsibility for payment of all Oregon highway use taxes, fees and penalties arising from the operation of the vehicle or vehicles for the full term;
7. Provision that the permittee assumes full responsibility for compliance with these rules, the Code and all other laws applica-

ble to the operation of motor vehicles in Oregon;

8. A detailed statement of the amount of compensation to be paid for use of the vehicle while held under lease and the method by which the same is to be determined.
9. A statement of the term of the lease and conditions of renewal, if any.

C— Compensation to be paid for the use of leased vehicles must be on a per term, *per mile*, or other comparable basis and in no case will a lease be approved which provides for compensation by a division or percentage of any rate or rates on any commodity transported in such vehicle or on a division or percentage of any revenue earned through use of the vehicle while held under lease.

D— Application to add leased vehicles to permit must be made on supplemental application forms furnished by the Commissioner.

E— If the vehicle is to be operated under lease less than ten days or for a single round-trip only:

1. A temporary pass in lieu of identification plates will be issued;
2. A fee as provided in the Code must be submitted in advance;
3. Subsection A of this rule is not applicable.

F— If the lease involves a *single trip in one direction* only:

1. The permittee must specifically agree to pay highway use taxes for extreme miles of travel in Oregon, both loaded and empty, on declared combined weight basis;
2. A temporary pass in lieu of identification plates will be issued;
3. A fee as provided in the Code must be submitted in advance;
4. Subsection A of this rule is not applicable.

G—Unless specific tariff or contract provision therefor has been approved by the Commissioner, no common or contract carrier shall for compensation lease, rent or provide to any person any motor vehicle subject to the Code and at the same time or in connection therewith provide, procure or arrange for, directly or by course of dealing, the services of a driver for such vehicle.” (Emphasis supplied)

There never was any contention, nor was there ever any evidence that the operations of these appellants were contrary to the laws of the State of Oregon. It was early admitted that the appellant, O. K. Transfer Co. had no connection with the case at bar.

* * * * *

The appellees contend that these appellants jointly or in concert have acted as common or contract carriers and have stressed almost, if not to the exclusion of “contract,” the statement that they operated as common carriers. It has been stated in a number of cases that what is a common carrier under the Interstate Commerce Act is what is a common carrier at common law. One statement as to the liability of a common carrier is as follows:

“The implied agreement of common carriers is to carry safely and at common law they are held to a very strict accountability for the loss of, and failure to deliver, goods received by them for carriage, being liable for all losses and injuries, except as stated *infra* 76-79, such as arise from an act of God or of the public enemy, the negligence of the shipper, or the inherent nature or vice of the property, or, as shown *infra* 75, perhaps from some other causes which have found recognition in different jurisdictions. The rule might now be more fully

stated as being that the common carrier is liable for *all loss or injury not due to the act of God or the public enemy, the inherent nature or qualities of the goods, or the act or fault of the owner or shipper*, it being understood that as to all of these excepted cases the carrier may be liable by reason of his own negligence or that of his agents, servants, or employees. Where the loss is not due to the excepted causes, it is immaterial whether the carrier was negligent or not, and the carrier cannot escape liability by proving reasonable care and diligence, or by showing that there was no negligence; and as to all of the excepted causes the carrier may, as shown *infra* 80, be liable by reason of his own negligence or that of his agents, servants, or employees. In many cases the liability of the carrier has been said to be that of an *insurer*, but in view of the exceptions to the rule of liability, the carrier is not technically an insurer, at least it is not an insurer as to the excepted causes of injury, nothing more being meant by the expression than that the carrier is absolutely liable, with only the exceptions recognized in the rule as above stated." (Emphasis supplied) 13 C.J.S., *Carriers*, § 71.

In order to come within such definition of a common carrier, it would be necessary for these appellants to have assumed certain duties and responsibilities which are inherent to the operations of such. An examination of the testimony in the contracts involved in this case reveal that not only did these appellants not assume inferentially or otherwise the duties of a common carrier, but specifically denied the same. It is respectfully submitted that the I.C.C. cannot force a party to assume the liabilities and responsibilities of a common carrier when the parties to the leasing contract have agreed that the lessor shall not be subject to such responsibilities. To permit the I.C.C. so to act would deprive the

lessor of property without due process of law. To hold that these contracts have no force and effect in law is to hold them to be "mere pieces of paper," which the parties did not live up to and never intended to live up to; whereas all the evidence shows that all of the parties to all or any of the contracts involved in this case, specifically complied with the terms of these contracts and did not violate any of the terms thereof, or act in excess of any of the rights or duties thereunder.

CONCLUSION

The trial court erred in determining that the operations of these appellants constituted the operation of a common or contract carrier engaged in interstate commerce, and based upon such conclusion granted an injunction. The decision of the trial court should be reversed.

Respectfully submitted,

R. B. MAXWELL,
First Federal Savings & Loan Bldg.,
Klamath Falls, Oregon,
JOHN M. HICKSON,
C. J. STOCKLEN,
Failing Building,
Portland 4, Oregon,

Attorneys for Appellants.

No. 16,327

United States Court of Appeals
For the Ninth Circuit

ALEXANDER L. VINCZE, an Individual; O. K.
TRANSFER Co., a Corporation; PIONEER
TRUCK RENTALS, INC., a Corporation; and
DRIVERS SERVICE, INC., a Corporation,

Appellants,

VS.

INTERSTATE COMMERCE COMMISSION,

Appellees,

BEND-PORTLAND TRUCK SERVICE, et al.,

Intervenor-Appellees.

Upon Appeal from the District Court of the United States
for the District of Oregon.

BRIEF OF APPELLEE
INTERSTATE COMMERCE COMMISSION.

A. HENRY WALTER,

A. J. MERRILL,

Interstate Commerce Commission,
Washington, D. C.,

WILLIAM L. HARRISON,

Regional Attorney,
Bureau of Inquiry and Compliance,
Interstate Commerce Commission,
9 First Street, San Francisco 5, California,

C. E. LUCKEY,

United States Attorney,

R. R. CARNEY,

Assistant United States Attorney,
Portland, Oregon,

Attorneys for Appellee

Interstate Commerce Commission.

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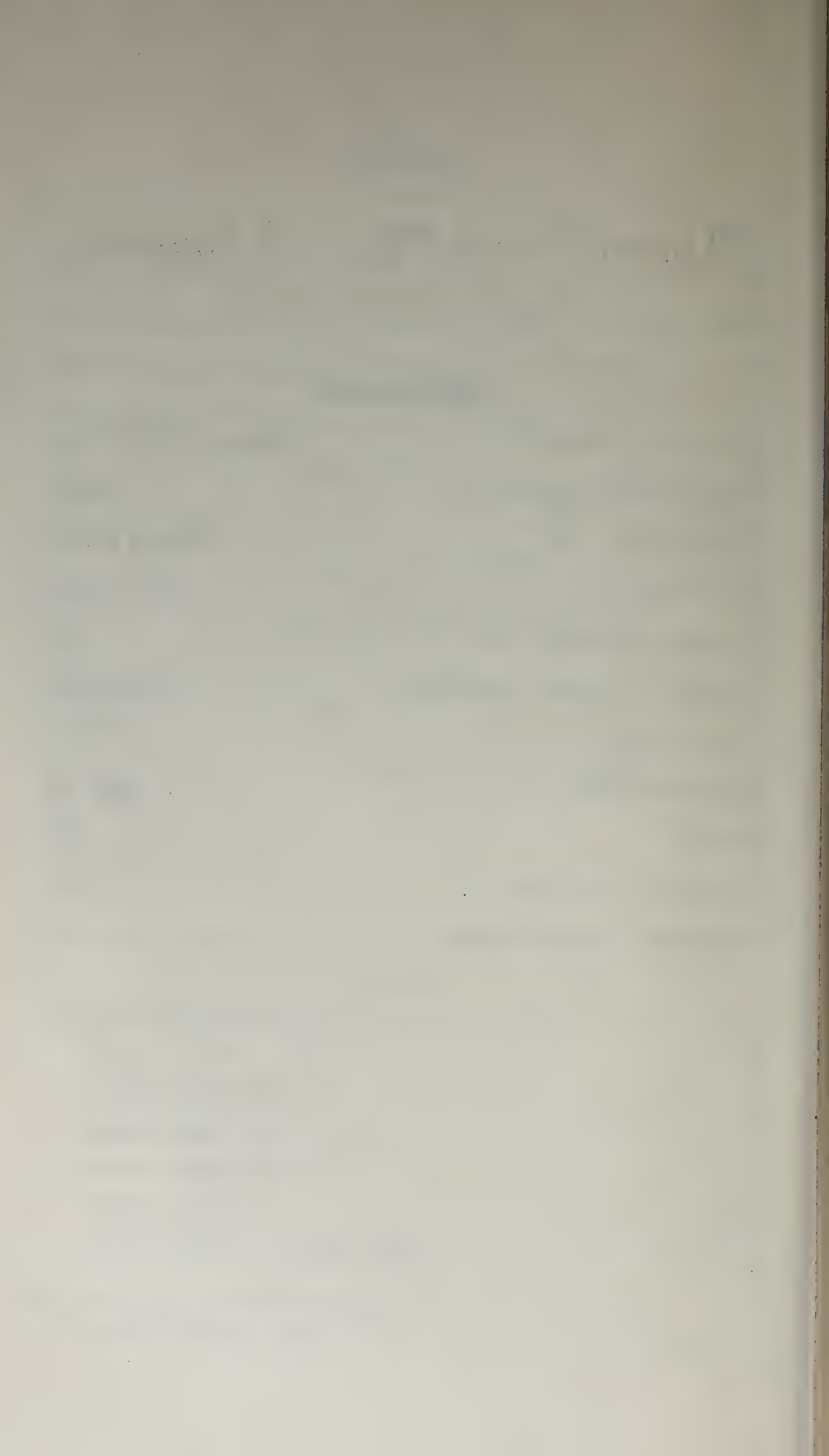
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Abbreviations

Alexander L. Vincze	Vincze or A. L. Vincze
Pioneer Truck Rentals, Inc.	Pioneer
Drivers Service, Inc.	Drivers Service
O.K. Transfer Co.	O.K. Transfer
Interstate Commerce Act	Act
Interstate Commerce Commission	Commission
Pre-trial order	P.T.O.
Appellants' Brief	App. Br.
Exhibit	Ex.
Transcript (Judge Fee)	F.T.
Transcript (Judge Solomon)	T.



No. 16,327

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ALEXANDER L. VINCZE, an Individual; O. K.
TRANSFER Co., a Corporation; PIONEER
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Appellants,

vs.

INTERSTATE COMMERCE COMMISSION,

Appellees,

BEND-PORTLAND TRUCK SERVICE, et al.,

Intervenor-Appellees.

Upon Appeal from the District Court of the United States
for the District of Oregon.

**BRIEF OF APPELLEE
INTERSTATE COMMERCE COMMISSION.**

I. PRELIMINARY STATEMENT.

By Findings of Fact and Conclusions of Law made and entered on the 9th day of January, 1959, the District Court found that the defendants Alexander L. Vincze, O.K. Transfer Co., Pioneer Truck Rentals, Inc., and Drivers Service, Inc., jointly and severally, engaging in the transportation of property in interstate commerce by motor vehicle for compensation

as either a common or contract carrier without authority from the Interstate Commerce Commission, were in violation of Part II of the Interstate Commerce Act, 49 USC Sections 306(a) and 309(a).

Pursuant thereto, the court entered a judgment and order for injunction enjoining and restraining the defendants and, each or any of them, in active concert or in participation with each other, from further engaging in the described operations until such time as proper authority was issued by the Interstate Commerce Commission.

Defendants, and each of them have duly appealed from this judgment and order of injunction.

II. JURISDICTION.

Jurisdiction of the District Court is invoked under Sections 204(a) and 222(b), Part II of the Interstate Commerce Act. (Title 49 USC Sections 304(a) and 322(b).) Jurisdiction of the Court of Appeals is invoked under Title 28, U. S. Code, Section 1291.

III. APPLICABLE STATUTE.

(Interstate Commerce Act)

See Appendix as follows:

Section 202(a) (49 USC 302(a)).

Section 203(a)(14) (49 USC 303(a)(14)).

Section 203(a)(15) (49 USC 303(a)(15)).

Section 203(a)(19) (49 USC 303(a)(19)).

Section 206(a) (49 USC 306(a)).

Section 209(a) (49 USC 309(a)).

IV. FURTHER STATEMENT OF THE CASE.

Appellants' statement of the facts, particularly the quoted excerpts of witness testimony, (App. Br. 17 to 24) is wholly incomplete. The final determination of this case depends upon a full presentation of the facts to this court. The facts are:

A. Incorporation and ownership of Pioneer and Drivers Service.

A. L. Vincze was the primary incorporator of both Pioneer and Drivers Service. The articles of incorporation for both of these corporations were filed with the Oregon Corporation Commissioner by Vincze, simultaneously on December 2, 1953. (Ex. 1 & 2.) At the time of the filing of this action (November, 1954) Vincze owned 98% of the stock of both corporations. Just prior to the first trial of the case before Judge Fee, Vincze transferred his stock in Drivers Service to Grant Beeney, an employee of Pioneer, who became president of Drivers Service. On September 30, 1957, Beeney resigned as president and Lorne A. Pratt succeeded him and was assigned 98% of the stock of Drivers Service. (P.T.O. XII and XIV.) Vincze denied that Pratt was ever an employee of Pioneer (T. 255-256) but the record shows Pratt as signing checks for Pioneer prior to his assumption of the presidency of Drivers Service. (Ex. 128.) Grant Beeney is now again an employee of Pioneer. (T. 252-253.)

A. L. Vincze still retains 98% of the stock of Pioneer. (P.T.O. XII.)

A. L. Vincze owns 723 shares of a total of 870 shares of the outstanding stock of O. K. Transfer. O. K.

Transfer for many years held a certificate issued by the Interstate Commerce Commission authorizing it to operate as a common carrier in interstate commerce for compensation. This certificate was sold on March 1, 1957, but the corporation remains a legal entity.

Neither Vincze, an individual, Pioneer nor Drivers Service have ever held or now hold, any authority from the Commission to engage in interstate commerce as either a common or contract carrier. (P.T.O. Admitted Facts.)

B. Facts of operation.

1. Single office. Offices are maintained at Portland and Klamath Falls, Oregon, and Los Angeles, California. Both corporations, Pioneer and Drivers Service, share the same office. (T. 254-255-258.) Pioneer's key employees were or are: Burton at Portland (Ex. 122, T. 155) and at Los Angeles, Currier (Ex. 122, Ex. 136—Deposition), Stombs (Ex. 122, Ex. 138—Deposition) and Jauregui (Ex. 122, Ex. 137—Deposition). Drivers Service does not have any employees at either Portland or Los Angeles. Pioneer does not have any employees in Klamath Falls. Lorne Pratt, president of Drivers Service, directs all operations at Klamath Falls under authority of A. L. Vincze.

2. Single Telephone Service. The only listing in the official telephone directories at Portland, Klamath Falls and Los Angeles is in the name of Pioneer. Drivers Service does not have a telephone listing at any office or terminal. (Tr. 233-234.)

3. Single solicitation. All solicitation is performed by Vincze, personally, or by employees of Pioneer. Shippers are offered the facilities of both Pioneer and Drivers Service by the same person and at the same time. Shippers are advised by the same person that in order to avail themselves of the services offered they are required to sign two separate contracts—one for Pioneer, and one for Drivers Service. No shipper was ever solicited by any person who represented Drivers Service for any purpose.

4. Single Cost or Charge. Vincze, or an employee of Pioneer, quotes to shippers a flat or total charge for the combined services which is usually 44¢ per mile. Generally, shippers are advised that the total charge is to be divided and paid—part to Pioneer and part to Drivers Service. Shippers do not know nor do they care how the total charge is divided, they are interested only in the total charge. Flat charges or costs, also, are quoted by correspondence by Pioneer. (Ex. 112-113-114-151.)

5. Single execution of contracts. Drivers sign both contracts. Both Pioneer and Drivers Service contracts are signed in most instances by drivers of the vehicles who supposedly are in the employ of Drivers Service. Both contracts are generally signed by the drivers at the time and place of pick-up at the shipper's place of business. (Ex. 5(a) to 5(k), incl., and 100 to 108 incl.) (F.T. 45-46), (F.T. 52), (T. 192), (T. 169), (T. 158-159), (T. 205).

6. Mutuality of Contracts. Vincze, or the employees of Pioneer, furnish shippers books of blank

Pioneer rental agreements and books of Drivers Service contracts for their use at the same time. In case business is secured from shippers who do not have the blank form agreements and contracts, drivers are furnished books of both forms for use as the occasion demands. Pioneer's agreement merely provides for the furnishing of the truck to the shipper. (Ex. 159 (a).) Drivers Service contract specifically and expressly recites that the owner has leased certain equipment under a written lease and Drivers Service "agrees to perform all obligations of the owner under said lease, except the obligation to pay the rent specified therein". The obligations assumed by Drivers Service can only be defined by reference to the Pioneer agreement. The Pioneer agreement and Drivers Service contract are executed at the same time. There is no evidence that either a Pioneer agreement or a Drivers Service contract was ever executed independently of the other or that a Drivers Service agreement was ever executed and drivers furnished to a shipper other than to those shippers who had executed a Pioneer Rental agreement.

The obligations of Pioneer's agreement and Drivers Service contracts commence at the shipper's point of loading. Likewise, these obligations cease at consignee's point of unloading where and when the truck is returned to Pioneer or its "agent." Drivers Service delivers the truck to the shipper and Drivers Service returns the truck to Pioneer.

Likewise, the total revenue is split as between Pioneer and Drivers Service on a fifty-fifty basis for accounting purposes. (Ex. 152, 153, 155, 156, 157.)

7. Single Assumption of Contract Obligations. Although the Pioneer Rental agreement merely provides for the furnishing of a truck, Pioneer, in its name, actually performs the obligations provided under Drivers Service contract, such as, (a) Pioneer pays highway use taxes and other taxes to the regulatory bodies of the State of Oregon and the State of California (Ex. 119, 129, and 147), (b) Pioneer provides personal injury and property damage insurance (Ex. 7(d) and 144), (c) Pioneer provides cargo insurance (Ex. 7(a), 7(b), 7(c), 117 and 139). Just prior to the present trial the cargo insurance was transferred to Drivers Service (Ex. 158) under instructions and directions by A. L. Vincze, and Grant Beeney, a present employee of Pioneer. (d) Pioneer secures special statutory permits for the operation of vehicles within the different states (Ex. 149).

8. Single control of drivers. A. L. Vincze or the employees of Pioneer Truck Rentals, hire, dispatch and fire drivers operating the equipment. These same drivers testified that at no time did they contact any representative of Drivers Service concerning employment or were they ever directed or dispatched by any representative of Drivers Service. (Mayfield F. T. 44), (Steward F. T. 55), (Payne T. 125), (Clendenen T. 144-145), (Frey T. 166-167), (Wilson T. 175), (Childers T. 183), (Goldsby T. 193-194), (Ford T. 196-199-201), (Ceglia T. 204), (Johnson T. 213), and (Damon Ex. 135).

9. Single clerical and accounting functions. Drivers Service is employed by Pioneer to perform clerical work for it. (T. 252.) Likewise, Lorne Pratt, pres-

ident of Drivers Service, is designated as office manager of Pioneer (Ex. 147, 148, and 150). Under this arrangement the evidence discloses (a) that both Pearl McPherson (employee of Drivers) and Lorne Pratt draw checks on both the accounts of Pioneer and Drivers Service. (b) Pioneer employees are paid by Drivers Service (Currier Ex. 136—Deposition and Ex. 130(b)—checks), (Burton T. 159 and Ex. 130(c)—checks), (Stombs Ex. 138—Deposition and Ex. 130(e)—checks). There is a constant interchange of payments as between the two companies. For the year of 1957, Pioneer issued checks to Drivers Service in the sum of \$26,616.10, and Drivers Service issued checks to Pioneer in the sum of \$16,654.07, making a total of \$43,270.17 in inter-company financing. (Ex. 128.) (d) That settlement sheets with owner-operators (who leased their vehicles to Pioneer for releasing by Pioneer to shippers and who drove their own vehicles or hired their own drivers) show gross income from both corporations with expenses and deductions peculiarly related to the functions of each—all intermingled and interwoven in one financial statement. (Ex. 152 to 157, incl.)

C. Service received by shippers.

In the first trial before Judge Fee the following named shippers testified, viz., C. R. Youngblood, Charles Heaton, Harold E. McCormick, C. B. Collins, Earl H. Holst, and Donald Sheedy. In the present trial before Judge Solomon the following shippers testified, viz., David J. Lees, Bernard Guthrie, Max Allen, John A. Beckstrom, and Donald O'Connor.

Also, depositions of shippers were taken as follows: Harry D. Gobrecht (Ex. 9), John H. Pihl (Ex. 14), Rudolph Illing (Ex. 15), Douglas Trestrain (Ex. 140). It is substantially the uniform and unanimous statement of these witnesses as follows.

Upon a single phone call or a written order to Pioneer, shippers receive a complete transportation service in the form of (1) a truck and driver, (2) full public liability and property damage insurance, (3) complete cargo insurance coverage, (4) at an agreed single factor cost or charge, (5) for a one-way trip. That they were relieved of (6) all expenses of maintenance and repair and (7) with compliance with all local, state and federal regulations as well as regulatory taxes, licenses, and fees.

The testimony discloses that these witnesses gave instructions to the drivers only as to the commodities to be picked up, supervised the loading, and directed the driver as to the name of the consignee and destination, and point of intermediate drop-offs, if such were contained in the shipment. And, further, contemporaneously with the tender of the goods, the great majority of these shippers executed a bill of lading, a copy of which was turned over to the driver of the vehicle. In no case did any shipper ever individually, separately, or otherwise, contact Drivers Service as such, or any employees of Drivers Service in order to contract for its service.

To effectuate this service, shippers were furnished with two forms of contracts, one for Pioneer, and one for Drivers Service. They were instructed to sign

both forms and upon receipt of separate invoices to write separate checks to each—which they did.

All arrangements were for a one-way trip and they can best be summed up by the testimony of shipper witness Lundahl, who testified that Drivers Service was furnished by Pioneer “automatically” (T. 55), and by Pihl, who stated that the service his company received was the same as that as any common carrier service in that it was “a one-shot deal”. (Ex. 14 Deposition P. 30.)

V. QUESTION PRESENTED.

Are the defendants, severally or collectively, or any of them acting in concert with any other engaging in the transportation of property in interstate or foreign commerce, for compensation, as either a common or contract carrier, and subject to the regulatory provisions of the Interstate Commerce Act, Part II; or conversely, are the shippers transporting their own commodities as a private carrier and as such not subject to certificate or permit provisions of the Act. (Sections 206(a) and 209(a).)

Succinctly stated—who is the transporter?

VI. SUMMARY OF ARGUMENT.

A. Scope of review of the Appellate Court.

B. Appellants have advanced propositions in support of Specification of Errors which have neither factual nor legal merit.

C. There is substantial evidence to support the finding that appellants, acting together and in concert, are operating as a common or contract carrier.

1. The evidence supports the finding that A. L. Vincze dominates and controls the activities, facilities and instrumentalities of O.K. Transfer, Pioneer, and Drivers Service.

2. The evidence supports the finding that Pioneer and Drivers Service are, in fact, a single integrated operating company.

3. The evidence supports the finding that appellants perform every single act connected with, and assume every obligation of a common or contract carrier.

D. There is rational basis and judicial support for the trial court's conclusion of law.

VII. ARGUMENT.

A. SCOPE OF REVIEW OF THE APPELLATE COURT.

Rule 52(a), of the Federal Rules of Civil Procedure sets forth the scope of appellate review and the findings below should not be disturbed unless found to be "clearly erroneous". To be so disturbed the reviewing court must be "left with the definite and firm conviction that a mistake has been committed". *United States v. U. S. Gypsum Co.*, 333 U.S. 364. This court has so construed the rule on numerous occasions. *Super Mold Corp. of California v. Bacon* (1942) 130 F. 2d 860; *Ford v. United Fruit Co.*,

(1948) 171 F. 2d 641; *Lerner Stores Corp. v. Lerner* (1947) 162 F. 2d 160. A recent case involving review of a similar factual situation is the 10th Circuit case of *Lamb and Poynor et al. v. Interstate Commerce Commission*, (1958) 259 F. 2d 358.

B. APPELLANTS PRESENT AND ARGUE PROPOSITIONS IN SUPPORT OF SPECIFICATION OF ERRORS WHICH ARE WITHOUT FACTUAL OR LEGAL MERIT HERE.

1. The body of law which grew up and surrounds the “chartering” of ocean going vessels has no application to the regulation of motor carriers. The inherent nature of the “demising” of ships created a necessity in the acceptance of the “full reach doctrine” which is intimately peculiar to that type of undertaking. No similarity exists as to motor carriers and motor carrier operations are regulated by statute. Also, upon placing jurisdiction of inland and inter-coastal water carriers under the jurisdiction of the Commission (Part III of the Act, 1942), the Congress abrogated that part of the ancient rules as to chartered vessels, as to these water carriers, by specifically designating the owner thereof as the carrier by Section 302(e) (49 USC 902(e)).

2. The defendants are charged with the violation of a specific statute in this case. The court is not called upon to supply any “omission” in the statute by judicial legislation—it is called upon only to evaluate the facts. In *Scott v. Interstate Commerce Commission*, 213 F. 2d 300 (10th Cir.), the facts presented

an issue of for hire carriage versus private carriage. The court said:

“The question presented for determination is one of classification under the Act (*supra*). It is whether Scott falls within the class of a contract carrier, within the meaning of Section 203(a)(15), or that of a private carrier, within the meaning of Section 203(a)(17). Where there are controverted issues of material facts in a case of this kind, the burden rests upon the Commission to show by a preponderance of the evidence that the character of the business of the carrier is such as to bring him within the class of a common or contract carrier. (Citing cases)”

3. The fact that Pioneer may be registered as a private carrier in the State of Oregon and performs other acts of a regulatory nature as an incident to such registration, is without determinative merit here. The transportation here was and is in interstate commerce and subject to federal regulations. States may regulate but only when not inconsistent with or contrary to the paramount law. *People of California v. Zook*, (1949) 197 P. 2d 851, 336 U.S. 725; *People of California v. Buck*, (1950) 226 P. 2d 87, 343 U.S. 99. The facts surrounding Pioneer's Oregon private carrier permit are illuminating. Pioneer, through A. L. Vincze, qualified for such permit because it made a showing that it had transported its own goods (tires, equipment, etc.) on its own vehicles and, accordingly, the permit was issued. In the case at bar Pioneer contends, of course, that it is engaged only in the business of renting trucks. The fact of the matter is the

State of Oregon has challenged Pioneer's operations and it is apparent from that controversy that Vincze is attempting to use his questionable Oregon private carrier status to facilitate the interstate operations here under consideration. (Ex. 146, Transcript of hearing—*Pacific Diesel and Pioneer Truck Rentals v. Howard Morgan, Public Utilities Commissioner*.¹) There is in reality no inconsistency between Oregon's regulatory statutes and the Act.

C. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING THAT APPELLANTS ACTING TOGETHER AND IN CONCERT, ARE OPERATING AS A COMMON OR CONTRACT CARRIER.

1. The evidence supports the finding that A. L. Vincze dominates and controls the activities, facilities, and instrumentalities of O.K. Transfer, Pioneer, and Drivers Service.

The employees of both Pioneer and Drivers Service are under the domination and control of Vincze, directly, or indirectly. It is admitted that Vincze organized, owned and controlled O.K. Transfer, Pioneer and Drivers Service and that he retained his ownership and control until some six months after this suit was commenced when he transferred his controlling stock in Drivers Service to Grant Beeney, a former employee of Pioneer; that Beeney subsequently resigned and transferred his stock to Lorne Pratt. The

¹Plaintiff sought an injunction to restrain state officials from interference with their interstate operations. The case was first brought in the District Court of Oregon. Judge East dismissed for want of jurisdiction. The case was refiled in the state court where it is now pending in the Supreme Court.

record shows that Pratt was a former employee of Pioneer and that Beeney is now again an employee of Pioneer.

The record shows that Vincze, directly, or through his Pioneer employees, continues to dominate and control the activities of Drivers Service. Lorne Pratt and Pearl McPherson are the only employees of Drivers Service on record. Vincze admitted that Drivers Service has been employed by him to perform all office duties for Pioneer, and that Lorne Pratt is the authorized and designated office manager for Pioneer at Klamath Falls. The record discloses that the employment of drivers was and is originally arranged by Vincze personally. No driver was ever employed by or through the Drivers Service organization, nor were their services terminated through Drivers Service but always through Vincze or an employee of Pioneer. In the conduct of the operations, drivers at all times were under the immediate supervision and direction of Pioneer. Drivers were dispatched by Pioneer to pick up loads. Upon unloading at destination, the drivers called Pioneer—the only office and only telephone number available—for instructions for further shipments. There is no evidence that drivers at any time received direction, supervision or instructions from Drivers Service. Drivers received no supervision or instructions from shippers, except those instructions usually given to for-hire carriers.

2. **The evidence supports the finding that Pioneer and Drivers Service are, in fact, a single integrated operating company.**

Both companies share a single office at Portland, Klamath Falls and Los Angeles. Drivers Service does not advertise or offer its corporate functions to the public generally. It has no telephone listing. No shipper has ever attempted to or used the services of Drivers Service independently.

A. L. Vincze, directly, or his Pioneer employees make all the arrangements for both Pioneer and Drivers Service. They (1) solicit and secure the business, (2) explain the dual contracts to shippers, (3) furnish the contracts to shippers and drivers, (4) quote single factor or total charges, and (5) keep the operation moving by dispatching the trucks. At no time did any shipper have any dealings of any type with Drivers Service or anyone who pretended to represent that company.

Drivers, purportedly in the employ of Drivers Service, are authorized by Pioneer and sign both contracts at the same time. The evidence demonstrates that Pioneer assumes and performs the functions and duties assigned under the Drivers Service contracts such as payment of state use taxes, the securing of special state permits and arranging for all types of insurance including cargo insurance. The same persons are authorized to draw checks on the account of both companies. There is a continuous inter-payment of checks passing between the companies. For some unexplained reason, Drivers Service, from its own account, pays the employees of Pioneer.

The accounts with third parties, which under the respective contracts would be maintained separately, are co-mingled. This is demonstrated by the settlements made with owner-operators, who leased their vehicles to Pioneer and who in driving the vehicles purportedly were in the employ of Drivers Service. All items in connection with the mutual obligations of each company with the owner-operator are combined in a single settlement sheet and a single balance is struck.

In actuality Pioneer is the body and Drivers Service is nothing more than the operating arm. In a trip lease service, such as operated here, where the shippers contract obligation supposedly begins at its place of business and ends upon unloading of the vehicle, Pioneer must rely upon Drivers Service to deliver the truck to the shippers and to return the truck to it at destination. The contracts are mutually dependent—the execution of one presupposes the execution of the other.

In this case it is abundantly apparent that Drivers Service desires and intends to become the agent of the shipper. It is clear there must be more than an intent or desire in order to create an agency relationship. Neither by agreement or in fact does the shipper have the right to direct or control any service which Drivers Service agrees to perform for it. The facts adequately demonstrate that the shipper hires the truck and every element and duty of a transportation service is furnished with it.

3. The evidence supports the finding that appellants perform every single act and assume every obligation of a common or contract carrier.

The shippers are not transporters. In connection with each shipment the shippers perform only one general duty, and that is to pay the charges required for the transportation of property. The law states that the term private carrier of property (Section 203(a)(17); 49 USC(a)(17) means "any person—not a common or a contract carrier, who or which *transports* by motor vehicle property of which such person is the owner". When viewed in the light of duties pertaining to transportation it is clear that the shippers are not private carriers—they perform no transportation at all. The shippers did not have possession, control, or custody of the motor vehicles. Nor did any of their employees direct or supervise the operations of the trucks or the drivers in any manner. In proof of these facts, if a truck had been dispatched to get a shipment for any shipper, and the truck never returned with the cargo, under any or all of the agreements and facts in this case, the shippers would have no obligations to return the truck or pay for its use. This alone would be conclusive of the fact that the shippers never acted in the status of a private carrier of its own property, under the arrangements shown in this case. Every single duty, excepting the duty to pay the charges, is performed by others.

The conclusion is inescapable that the use of two separate contracts, with the concomitant payment by the shippers of two invoices, is but a fiction designed to give color to a private carrier status of the shipper.

**D. THE TRIAL COURT'S CONCLUSIONS ARE UNANIMOUSLY
SUPPORTED BY CASE LAW.**

The methods employed by appellants to effectuate a transportation service are not new—possibly a little more ingenious. Every case of this type presents a combination of acts by which the truck owner and other participants attempt to avoid the application of the Act to the transportation. The individual corporate rental agreements and service contracts, per se, standing separately may possess patent legality upon their face, but they are primarily and initially prepared and used for the sole purpose of setting in motion a scheme and subterfuge designed to circumvent the law.

Only a few of the leading cases will be cited. The quotations, while somewhat lengthy are set forth because they contain in some instances the factual situation and also, announce so fully the rationale of court decisions in similar cases.

The leading case wherein the leasing of trucks and furnishing services was involved was decided by the Fifth Circuit Court of Appeals in 1941. The facts were different, but the principle involved is the same. The truck owner wanted to operate his trucks, the shipper desired to get transportation on the trucks, but did not want to operate them.

“We think it may not be doubted that if the evidence supports appellant’s view that its business was confined to simply renting trucks for use by others, appellant would be right in its insistence that it was not engaged in transportation within

the invoked act. We are equally without doubt however, that the evidence in this case affirmatively establishes that appellant's business is not so confined. On the contrary, though its operations have been to some extent invested with the form of a renting or hiring business, this investiture is but a device or subterfuge behind and under which appellant, in substance and in reality, operates a transportation business. It is true that the contracts, under cover of which the operations were conducted, are in most of their provisions, carefully drawn to give color to appellant's claim of renting only, and if the operations had been conducted strictly within that form, there might have been some question whether the operations so conducted were transportation operations within the invoked act. When however, the contracts are read in the light of the construction accorded them by the parties by the actual operations under them, it is clear that the scheme as a whole is a mere subterfuge, an unpermitted evasion, not a real avoidance of the provisions of the law. In the argument much refinement was indulged in, much speculation was raised, many authorities cited, as to how close one might approach the line of transportation without being regarded as having stepped over it. We need not indulge here in any of these refinements. It is sufficient for us to say: that the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them, all of those who, no matter what form they use, are in substance, engaged in the business of interstate or foreign transportation of property on the public highways for hire; and that the evidence admits of no other conclusions than that appellant is so

engaged.” *Georgia Truck Rental v. I.C.C.* 123 Fed. 2nd 210 at 211.

In an exceptionally detailed district court opinion, which reviewed the cases and the law, the same general type of operation was under consideration. The Georgia Truck System case was followed. The court stated the general law as follows:

“In the court and Commission cases, the issue of whether a carrier status subject to regulation on the part of the lessor existed has been determined by how much service which goes with ordinary hauling for compensation was being furnished the shipper in addition to the leased vehicle. Also whether on the whole the dealings and arrangements between the parties indicate that a transportation service was being rendered by the lessor to the lessee rather than simply furnishing for private operation a vehicle to the shipper, and whether the vehicle was being operated by the shipper in the same manner as would normally obtain if he were the owner of the rented equipment.”

“The essential facts in this case establish the motor carrier status of defendant and disprove the operations of a truck rental activity, in that defendant (1) indirectly furnished and selected drivers for the vehicles leased to shippers; (2) made single trip one-way leases for the motor equipment to shippers, the defendant taking possession of the vehicle for further leasing to another shipper for a return haul, or after discharge of the cargo at destination; (3) assumed responsibility for the safe delivery of the cargo transported and furnished cargo insurance; (4) rec-

ognized liability for the operations of the leased vehicle on the highway and furnished public liability and property damage insurance payable to lessor or lessee as their interests may appear; (5) issued in many instances receipts or bills of lading to the shipper for the contents of the cargo hauled on the leased vehicles; (6) collected from shipper-lessee compensation for the rental of the vehicles, computed in rates in cents per each 100 pounds of property hauled or at a truck mile rate or flat rate, which sustained a relationship to normal transportation charges instead of the use of the leased vehicle; and (7) arranged for the segregation of the driver's wages of the leased vehicle on a mileage wage formula and had the shipper pay it and then credit the amount of such wages on the agreed total compensation to defendant from the shipper."

"On the other hand, when, as in this case, a transportation service is in fact rendered under the guise of the leasing of vehicles to shippers, the transportation costs and rates become a subject of barter between the vehicle owner or truck rental operator and the shipper. In order to insure to the general public equality in rates and service for essential transportation, Congress enacted the Interstate Commerce Act, and if the practice of providing unregulated transportation under the guise of leasing vehicles were to become a general practice, the regulated agencies of transportation would be seriously impaired. Shippers and the public would be deprived of transportation service at equal rates and service." *Interstate Commerce Commission v. F & F Truck Leasing Co.*, 78 Fed. Supp. 13 at 19.

Another district court case involving the same type of operation in which the decided cases are cited is: *Interstate Commerce Commission v. Gannoe* 100 Fed. Supp. 790. This case followed the *Georgia Truck Rental* case (*supra*) and stated:

“Its (the Act’s) terms are sufficiently comprehensive to include *all* of those who, no matter what form they use, are in substance engaged in the business of inter-state transportation of property transportation is of no avail. Gannoe’s intention on public highways for hire. (Citing cases) A plan or scheme which disguises the true nature of the transportation is of no avail. Gannoe’s intention was to earn compensation for the use of his equipment and *services* in transporting the products of the shipper over the public highways in interstate commerce. His first attempt to give the shipper the status of a private carrier is clearly a subterfuge; the second attempt under an artfully drawn agreement, is simply a better disguise; his intention remained the same.”

The most recent decision and a most apposite one, is *Lamb and Poynor etc., Utah Wholesale Grocery Company, and Load Service, appellants, v. Interstate Commerce Commission, appellee*, (10th Cir. decided Sept. 2, 1958) 259 F. 2d. 358.

There the facts were that Poynor and Lamb were not either common or contract carriers but were engaged in the transportation of exempt commodities which transportation is not subject to the certificate or permit provisions of the Interstate Commerce Act.

Generally, they had only a one-way haul. Utah Grocery, a shipper, required transportation services, generally, in the reverse direction. Poynor and Lamb organized Load Service, Incorporated. Poynor and Lamb owned a majority of the stock and Lamb actively managed the operations of both companies. The corporate purpose of Load Service was to engage in the business of securing loads and providing other incidents of transportation including drivers. The arrangement, then, was that Poynor and Lamb leased trucks to Utah Grocery and Poynor and Lamb's drivers were furnished to Utah through Load Service. Poynor and Lamb billed Utah for truck rentals. Load Service prepared and submitted bills detailing its charges with the amount to be paid the drivers shown thereon. Utah paid these separate charges and issued checks to the drivers with deductions but delivered them to Load Service who turned them over to the drivers. Poynor and Lamb and Load Service were each paid by separate checks.

Subsequent to the original arrangement, Lamb and Poynor withdrew from Load Service and that company henceforth operated, to all intents and purposes, independently. While the details of the arrangement differ in some respects from the case at bar, the intent and purpose of the over-all arrangement was to divorce and separate the drivers from the vehicles to make it appear that Utah, the shipper, was a private carrier—renting bare trucks from one company and securing transportation service, including drivers, from another.

The record there supported the finding that Utah Grocery did not control either, the trucks furnished by Poynor and Lamb, or, the drivers furnished by Load Service and, did not assume any of primary or incidental acts of a transporter. It paid only a charge for transportation. In holding that Utah Grocery was not conducting a private carrier operation but rather was receiving a for-hire carrier service, the appellate court said:

“... the lease arrangement is but a component part of an over-all plan to frustrate the purposes of interstate commerce regulation through unpermitted evasion rather than by bona fide avoidance of the provisions of the law. . . . In 1955 and continuing until the initiation of this action the integration of the plan to unify an operation in interstate commerce was emphasized by the common ownership and operation of Trucking Co. and Load Service. Changes have since been made so that Load Service is now independent of Trucking Co. in both ownership and management. This is a step in the right direction, *Interstate Commerce Commission v. Vincze*, 151 F. Supp. 499² but is insufficient to raise the over-all plan to one of bona fide substance”.

In the above case the court recognized that previously decided cases have held that a truck owner cannot lease a truck and perform additional services without himself becoming a carrier; that in order to avoid this situation, the truck owner has devised artfully drawn lease and agency agreements wherein the

²This is the citation to the decision of Judge Fee in the first trial of this case.

truck owner furnishes the truck, and a second person performs all services with the result that the two of them perform all transportation for the shipper.

A most recent case decided by the Supreme Court of Oregon also involved A. L. Vincze and his "leasing" activities, *State of Oregon etc. v. O.K. Transfer and A. L. Vincze, its President and Manager*, (decided October, 1958), 330 Pac. 2d 510. In that case O.K. Transfer Company held an Oregon Class A permit authorizing it to operate as a common carrier in intrastate commerce within a limited area of Oregon. It had rates filed and published applying to this type of service. O.K. Transfer, also, held a Class D permit authorizing it to rent or otherwise provide motor vehicles for temporary use in transporting property at Medford, Eugene, Portland and Klamath Falls, Oregon. This is commonly called "U-Drive" authority. The facts show that Vincze caused O.K. Transfer's vehicles to be transferred to the U-Drive permit and then rented trucks and provided drivers to shippers. Under this arrangement transportation was performed throughout the State of Oregon and at charges which were at variance with O.K. Transfer's common carrier tariff. O.K. Transfer did not hold any contract carrier authority. The issue presented was whether the activities of O.K. Transfer under its U-Drive permit constituted transportation for-hire carrier service. The Supreme Court in an exhaustive analysis of Federal and State cases, unanimously affirmed the trial court findings that "the so-called rental or leasing investiture has been consistently held to be a device

and subterfuge behind or under which the owner in substance and reality operated a transportation business for hire.”

That case also presents the background potential of Vincze’s controlled O.K. Transfer Company. It is a carrier, with facilities and equipment, intimately involved in Vincze’s every action.

Where individuals, corporate entities or both, jointly, band together for a common purpose the legal effect is most aptly stated in the earlier case of *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 222, 249. That case was an anti-trust suit involving a labor union, its subordinate councils, field organizations and certain individuals. In discussing the matter of the “combination” the court said with respect to the admissibility of evidence going to the proof of that point:

“* * * (the rule) is of general application; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of a common object, is the act of all . . .”.

This principle of law is most applicable in this case even if it could be found that some semblance of independence existed between the separate corporate entities.

VIII. CONCLUSION.

The trial court's Findings of Fact are clearly correct; and its Conclusions of Law are supported by overwhelming authority. Its Judgment and Order of Injunction should be affirmed.

Respectfully submitted,

A. HENRY WALTER,

A. J. MERRILL,

Interstate Commerce Commission,
Washington, D. C.,

WILLIAM L. HARRISON,

Regional Attorney,
Bureau of Inquiry and Compliance,
Interstate Commerce Commission,
San Francisco, California,

C. E. LUCKEY,

United States Attorney,

R. R. CARNEY,

Assistant United States Attorney,
Portland, Oregon,

Attorneys for Appellee

Interstate Commerce Commission.

(Appendix Follows.)

Appendix.

Appendix

Sec. 202(a)

The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

Sec. 203(a)(14)

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Part I, to which extent such transportation, shall continue to be considered to be and shall be regulated as transportation subject to Part I.

Section 203(15)

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a)

for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer. (Amended 8-22-57).

Sec. 203(a)(19)

The "services" and "transportation" to which this part applies include all vehicles operated by, for or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

Sec. 206(a)

No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operation.

Section 209(a)

No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway, unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business.

No. 16336

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**HOD CARRIERS, BUILDING AND COMMON LABORERS
UNION OF AMERICA, LOCAL No. 324, AFL-CIO, AND
RON WRIGHT, BUSINESS AGENT, LOCAL No. 324,
RESPONDENTS**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,

General Counsel,

THOMAS J. McDERMOTT,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

DUANE B. BEESON,

ALFRED AVINS,

Attorneys,

National Labor Relations Board.

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PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
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OF AMERICA, LOCAL NO. 324, AFL-CIO, AND RON
WRIGHT, BUSINESS AGENT, LOCAL NO. 324,
RESPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board to enforce its order (R. 35-37) issued against respondents on August 14, 1958, following the usual proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), hereinafter called the Act. The Board's Decision and Order are reported in 121 NLRB No. 55. This Court has jurisdiction of these proceedings under Section 10(e) of the Act, the unfair labor practices having occurred in Contra Costa County, California.

STATEMENT OF THE CASE**I. The Board's findings of fact**

In brief, the Board found that the respondents Hod Carriers, Building and Common Laborers Union of America, Local No. 324, AFL-CIO, hereafter called Local 324, and its business agent, Ron Wright, violated Sections 8(b)(2) and (1)(A) of the Act by refusing job clearance to four employees, and thereby depriving them of employment, pursuant to an unlawful hiring arrangement. The facts upon which the Board based its determination are not in dispute, respondents having failed to introduce any evidence following presentation of the General Counsel's case. They may be summarized as follows:

A. The Union's hiring arrangements with the employer

The events in this case relate to employment practices in connection with the construction of an oil pipe line by Roy Price, Inc., hereafter called the Company, for the Union Oil Company.¹ The pipe line was to extend some 220 miles from the Union Oil Company's refinery at Oleum, California, to its junction station about 45 miles south of Coalinga, California (R. 15; 60). Work on the project was begun on January 2, 1957 at Tracy, a point between the terminals, and

¹ The Company is a California corporation engaged in general construction work, but specializing in oil pipe line construction. Its operations have a substantial effect on interstate commerce; no jurisdictional question is presented (R. 11; 56-7).

progressed contemporaneously in each direction with separate work crews, referred to as "spreads" (R. 15; 62, 74).

Hiring procedures and conditions of employment on the construction were governed by a master collective bargaining contract, called the National Pipe Line Agreement, which had been executed by the Pipe Line Contractors Association, of which the Company is a member, and the International Hod Carriers, with which Local 324 is affiliated (R. 12-13; 59-61). Under this agreement, employer members of the Association were required to notify the International Union of construction contracts awarded them, and provision was made for a pre-job conference between the contracting employer and the representatives of the International and the local union affected (R. 14; 196-197). The agreement further provided that the employer could "employ men direct," but that he should "inform Union [at the pre-job conference] of the number of men whom he plans to bring with him into the area and have a mutual understanding with Union to enable Union to supply Employer with additional men who might be needed during the progress of the job" (R. 14; 195). In addition, it was provided that employment should be conditioned upon Union membership within 30 days after hire, to the extent that such an arrangement was permissible "under existing provisions of applicable State and Federal law" (R. 13; 195).

At the pre-job conference between the Company and the International Union before construction was begun on the Union Oil pipe line, it was agreed that the

Company would obtain any additional employees needed during the course of construction "from the local in whose territory the job is in at the time the men are required" (R. 15-16; 62). In addition, as work progressed, the Company followed the practice of requiring all of its employees, upon extension of the pipe line into a new county, to be cleared by the local of the International Hod Carriers which had jurisdiction in the particular county (R. 16; 79, 87, 107, 120).

B. The Union's refusal to clear four Company employees for work within its jurisdiction

Early in February, 1957, in accordance with its practice, the Company informed Local 324 when the pipe line approached Contra Costa County, which circumscribed Local 324's jurisdiction (R. 16, 34; 114-6). Upon receiving this information, Minerva, Local 324's business representative, told the Company that all laborers employed on the pipe line would have to be cleared by Local 324 in order to work in Contra Costa County (R. 16-17, 34; 114). Accordingly, the next evening, the Company sent its 32 laborers in a bus to Local 324's office, where Minerva gave clearance slips to each of them (R. 17; 114-5). Only eight of these employees were not already members of Local 324, and they were accepted into membership at that time (R. 17; 115).

Several days later, on February 8, 1957, four additional employees were sent by the Company to Local 324's office to obtain clearance (R. 17, 34; 86-87, 148). These employees, Merle Estes, Merlin Shamo, and Cecil and Jasper Hawkins, had been working on a sec-

tion of the pipe line near Tracy in the early part of February, and on February 7 were told by Superintendent Ralph Ungles to join the spread at the Contra Costa County line (R. 16, 17; 84-85, 147-148, 174, 177-178). Cecil and Jasper Hawkins were members of Local 324, but had obtained their jobs with the company by direct application, and not by dispatch from the Local (R. 16; 146-7, 157-8, 168-9, 181). Shamo and Estes were members of a different local of the same International (R. 16; 84, 164-5). Upon reporting to Local 324's office, the four employees were informed that the business representative was not in, and were told to return on Monday, February 11 (R. 86, 149).

When the four employees returned on Monday, respondent Ron Wright, business agent for Local 324, refused them clearance (R. 34; 88). He told them that "the company had no right to ask [them] into that area to work," and added: " 'It's not legal, but I will do it * * * You boys will not be cleared in this county' " (R. 17; 88). Wright also remarked "That the last time that Roy Price, Incorporated, was in that area he had cost them \$50,000.00 and that he would cost them more this time" (*ibid.*). The four employees returned to the job site and reported what had happened to Superintendent Ungles (R. 18; 89, 149). Shortly thereafter, business agent Wright also appeared at the job site, but when Ungles attempted to speak to him about the matter, Wright refused to talk with him, saying, " 'Go away, * * * I don't want to talk with you, I don't know you from a bale of hay' " (R. 18; 89-90, 150).

Later the same day several of the Company's officials, including President Roy Price and Superintendent Ungles, conferred with respondent Wright about clearance for the four men (R. 18; 118). They pointed out that Local 324 was not entitled under the National Pipe Line Agreement to block the employment of these men (R. 18; 119). Wright retorted "That the agreement wasn't any good," and "that he could not clear the men, they would have to go in the hall and go on the out-of-work list and wait their time" (R. 118, 119). Wright also threatened to "shut the job down" if any of the four employees worked without clearance (R. 118). Wright similarly told the project manager on another occasion that, having "already cleared 32 men * * * he wasn't going to clear any more for the job," and that from that time forward, the Company "would have to obtain all of our men out of Local 324" (R. 117). As a result of the impasse, the four men who were thus denied clearance were paid for February 8, and dismissed from the job, with the Company's assurance that they would be re-employed if they could obtain clearance from Local 324 (R. 18; 90, 92).

The following day, Merlin Shamo, one of the four men, telephoned a representative of the International Union in an effort to compel Local 324 to clear them for work (R. 19; 92, 94). Apparently as a result of this conversation Shamo received a call a few days later from the business agent of the local union in which he was a member who told him that respondent Wright had agreed to issue them clearance slips (R. 19; 95). Accordingly, the four men once more reported to Local 324's office, but when Wright saw

them he stated, "Can't you boys get it through your heads, you're not being cleared in this county" (R. 19; 96-7). The men went back to the job site and told Superintendent Ungles what had happened, and he again told them that if they could get clearance from Local 324 their jobs would be waiting for them (R. 19; 97-8).

Finally, on February 28, following the filing of the charges in this case (R. 98) the Company's president, Roy Price, informed Ungles, who in turn informed the four men, that the matter had been straightened out, and that they could return to work (R. 19; 98, 156-7). Accordingly, the men went back to their jobs, and sometime thereafter they were issued clearance slips by Local 324 (R. 20; 99, 156).

II. The Board's conclusions and order

Upon the foregoing facts, the Board concluded that Local 324 and its agent Wright violated Sections 8(b)(2) and (1)(A) of the Act by denying job clearance to employees Estes, Shamo, and Cecil and Jasper Hawkins pursuant to the arrangement with the Company which required such clearance as a condition of employment within Local 324's geographic jurisdiction. Following its decision in *Mountain Pacific Chapter, et al.*, 119 NLRB 883, 893, enforcement denied, August 28, 1959, 44 LRRM 2802 (C.A. 9), the Board determined that the control over employment given respondents by the clearance arrangement, in the absence of any safeguards against unlawful discrimination in the exercise of that control, falls within the statutory proscription against encouragement of union membership and coercion of employees in the

exercise of their right not to adhere to union rules or membership requirements. Accordingly, the application of the unlawful arrangement to deny employment to the four applicants in this case was found to have been in violation of the Act² (R. 34-35).

To remedy the foregoing violation, the Board's order requires respondents to cease and desist from causing the Company or any other employer to discriminate unlawfully in employment, or to restrain or coerce in any like or related manner employees of the Company or of any other employer, in the exercise of their right not to adhere to union rules or membership requirements. Affirmatively, the Board's order requires Local 324 to make whole the four employees discriminated against for their loss of wages suffered as a result of the discrimination, and further requires respondents to post appropriate notices (R. 36-37).

ARGUMENT

This case should be remanded to the Board for further findings in view of this court's decision in *N.L.R.B. v. Mountain Pacific, et al.*

As stated, the Board rested its determination in this case solely upon its earlier decision in *Mountain Pacific Chapter of the Associated General Contractors, et al.*, 119 NLRB 883, 893.³ In view of the

² No unfair labor practice finding was made with respect to the exclusive hiring arrangement itself since the complaint did not place it in issue as an unfair labor practice (R. 35, n. 1).

³ Before the Board respondents advanced two grounds which assertedly would require dismissal of the complaint without reaching the validity of a hiring arrangement of the kind found by the Board to be unlawful in the *Mountain Pacific* case: (1) That the Board improperly exercised jurisdiction in this case, and (2) that the discharge of the four employees in

fact that the *Mountain Pacific* case was pending before this Court upon enforcement proceedings at the time the petition for enforcement was filed in the present case, the Court, upon motion of the Board, entered an order extending the time for the Board to file its brief herein until 30 days after the Court's decision in *Mountain Pacific*. The latter decision has now been entered, and accordingly, the principal purpose of this brief is to examine the effect thereof upon the instant proceeding.

In the *Mountain Pacific* case, as here, the employers and unions involved had entered into an arrangement under which union clearance of employees was made prerequisite to employment. An exclusive hiring system of this kind was determined by the Board in the *Mountain Pacific* case to constitute, "apart from all other evidence in the case" (119 NLRB at 894), unlawful encouragement of union membership in viola-

this case was not caused by Local 324, but was the voluntary act of the Company. Neither contention has merit.

As to (1), respondents urged that the Board cannot properly assert jurisdiction over unions whose members work in the building trades because it does not conduct representation proceedings in the construction industry. The argument has been heretofore rejected by this Court. *N.L.R.B. v. Reed*, 206 F. 2d 184, 190 (C.A. 9); cf. *N.L.R.B. v. Daboll*, 216 F. 2d 143 (C.A. 9), certiorari denied, 348 U.S. 917; *N.L.R.B. v. Local 743, Carpenters Union*, 202 F. 2d 516 (C.A. 9); *N.L.R.B. v. Local 12, Operating Engineers*, 237 F. 2d 670 (C.A. 9), certiorari denied, 353 U.S. 910.

As to (2), we have already shown (*supra*, p. 5), that Local 324's agent enforced its exclusive clearance arrangement with the Company in the situation involved in this case by threatening "to shut the job" down if the four employees denied clearance were not discharged, thus plainly establishing respondents' responsibility for the discrimination against these employees.

tion of Sections 8(a)(3) and (1) and 8(b)(2) and (1)(A) of the Act. The Board added in its opinion in that case, however, that the parties to such an arrangement could neutralize its improper effect on employees, and thereby avoid illegality under the Act by incorporating in their agreement designated safeguards against union favoritism, and posting for employees' observation the provisions relating to hiring. 119 NLRB at 896-897.

As shown in the Statement, *supra*, pp. 1-3, Local 324 and the Company were parties to a clearance arrangement similar in all material respects to that involved in the *Mountain Pacific* case. See also n. 3, *supra*. Since the hiring arrangement in the instant case did not contain the protective clauses which in the Board's view are essential to its validity, the refusal to issue job clearances to the four employees involved in this case was in pursuance of an arrangement that was unlawful under the Board's *Mountain Pacific* decision. Accordingly, the refusal constituted an unfair labor practice under Board decisional law. Having found "that this case is governed by *Mountain Pacific*" (R. 34), the Board did not make any findings as to whether, apart from the application of the hiring arrangement, Local 324's refusal to clear the four employees was based on discriminatory grounds that would independently constitute an unfair labor practice.

In these circumstances, this case appears to require the same disposition made by the Court of the *Mountain Pacific* case in its decision of August 28, 1959.

See *N.L.R.B. v. Mountain Pacific Chapter et al.*, No. 15966, 44 LRRM 2802. (Compare, *Morrison-Knudsen, Inc. v. N.L.R.B.*, No. 16301, decided August 10, 1959, 44 LRRM 2680 (C.A. 9)). The Court there declined to apply the Board's doctrine that an exclusive hiring agreement, absent safeguards against discrimination, is violation of the Act.

The Court agreed that the Board could properly hold that "special significance must be given to the failure to include protective clauses in these contracts," and that the Board could properly "find as a fact that the omission of these guaranties or prohibitory clauses from a contract was evidence of an intent upon the part of the signatories and their associates to violate the Act" (44 LRRM at 2805). The Court felt, however, that the Board's determination to attach "special significance" to such a circumstance would constitute a "rule of evidence" which "should operate prospectively, since the burden is thereby shifted." The Court went on to say that "This approach cannot be upheld in the instant case. But this Court sees no reason why the doctrine once announced could not be applied in future cases" (44 LRRM at 2807).⁴

Remand in the instant case, as we understand the Court's views expressed in the *Mountain Pacific* case, should authorize the Board to make findings respecting the factual basis upon which Local 324 declined

⁴ The Court made clear that its remarks as to the prospective operation of the Board's doctrine do "not mean that the Board, in this case upon remand * * * might not find as a fact that the omission of these guarantees or prohibitory clauses from a contract was evidence of an intent * * * to violate the Act." (44 LRRM at 2805.)

to clear the four employees involved for employment. The Board would be entitled, moreover, to infer from the absence in the hiring arrangement of safeguards against discrimination that Local 324's action in this respect was in fact discriminatory and therefore unlawful. In such event, however, Local 324 and its agent would similarly be entitled to attempt to disprove such an inference by relevant evidence.

Upon this understanding of the effect herein of this Court's decision in *Mountain Pacific*, the Board is of the opinion that a remand is indicated in this case. The Board does not thereby mean to express agreement with the correctness of the Court's decision in *Mountain Pacific*, or to relinquish its right in the present case to seek Supreme Court review of this Court's denial to enforce the Board's order upon the grounds stated in its decision, in the event a remand order is entered. It is the Board's position simply that the present case is not distinguishable in legal effect from the *Mountain Pacific* case.

CONCLUSION

For the foregoing reasons, the Board, although of the opinion that its order in this case should be enforced in full upon the grounds stated in its decision, does not deny the controlling effect of the Court's decision in the *Mountain Pacific* case. Accordingly, the appropriate disposition of this case, assuming the Court wishes to follow its *Mountain Pacific* decision, is a remand order with instructions to the Board to make additional findings of fact.

STUART ROTHMAN,

General Counsel,

THOMAS J. McDERMOTT,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

DUANE B. BEESON,

ALFRED AVINS,

Attorneys,

National Labor Relations Board.

OCTOBER 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to

vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable ground for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

No. 16,336

IN THE

**United States Court of Appeals
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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

HOD CARRIERS, BUILDING AND COMMON
LABORERS UNION OF AMERICA, LOCAL
No. 324, AFL-CIO, and RON WRIGHT,
Business Agent, Local No. 324,
Respondents.

**BRIEF OF RESPONDENTS AND
OBJECTIONS TO REQUEST FOR REMAND.**

CHARLES P. SCULLY,
VICTOR VAN BOURG,
995 Market Street,
San Francisco 3, California,
Attorneys for Respondents.

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PAUL P. O'BRIEN

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**BRIEF OF RESPONDENTS AND
OBJECTIONS TO REQUEST FOR REMAND.**

JURISDICTION.

Unfair labor practice charges were filed on February 17, 1957. The Regional Director of the Twentieth Region of the National Labor Relations Board filed a consolidated complaint on March 15, 1957. After proceedings before the trial examiner and appeal to the Board, a decision and order were rendered by it on August 14, 1958, reported in 121 NLRB No. 55. The Board seeks to enforce its order by petition to this Court, whose jurisdiction is invoked pursuant to the Labor-Management Relations Act of 1947, as amended

(29 U.S.C. 151 *et seq.*) hereinafter referred to as the "Act", and pursuant to Section 10(e) thereof, in particular, the dispute having arisen in the County of Contra Costa, State of California. On February 10, 1959, respondents filed an answer to the Board's petition and requested dismissal thereof and the vacating of the order of the Board in this matter.

STATEMENT OF THE CASE.

1. Constitutional issue ignored by Board.

The Respondents, from the beginning of the proceedings in this case and at the time of hearing before the trial examiner and thereafter at each step in the proceedings interposed a motion to dismiss for the reason that the Board, in taking jurisdiction of unfair labor practice cases filed *against* labor organizations involved in the so-called "building Trades" and simultaneously refusing to assert jurisdiction in cases where such labor organizations were seeking the *benefits* of the Act, was arbitrarily and capriciously exercising its jurisdiction (Reporter's Transcript, page 9). This contention was at no time met or answered by the Board and this contention and its obvious application in this matter was barely recognized by the General Counsel in his brief filed on October 15, 1959.

2. Résumé of facts.

On February 17, 1957, four individuals, Merle Estes, Cecil Hawkins, Jasper Hawkins and Merlin L. Shamo, hereinafter collectively referred to as

“charging parties”, filed unfair labor practices alleging *only* that their rights protected by Section 7 of the Act had been infringed upon because they had not been “cleared” to a job in Contra Costa County, California.

The employer on the job in question was a joint venture of Roy Price, Inc. and Engineers Pipeline, Ltd., hereinafter referred to jointly as “employer”.

The dispute surrounds the construction of an oil pipe line which extended from the town of Oleum, California, to a spot some miles south of Coalinga, California, a total distance of some 220 miles. Part of the pipe line project ran through the County of Contra Costa, which is within the territorial jurisdiction of Respondent Union.

The wages and working conditions governing the construction of this pipeline were set forth in a contract referred to as the National Pipeline Agreement (General Counsel’s Exhibit 2) and was executed by the Pipe Line Contractors Association and the International Hod Carriers, Building and Common Laborers Union of America, AFL-CIO. Employers are affiliated with the Contractors Association and the Respondent Union is affiliated with the International.

In addition to the agreement, prior to the commencement of the project, a pre-job conference was held between representative of the Employer and representatives of the International Union.

The charging parties were employed by the Employer *prior* to the time that the project entered the territorial jurisdiction of the Respondent Union.

From this point, the resume of facts contained in the brief of the General Counsel contains a complete misstatement of the record of this case because it ignores or glosses over the fact that the pre-job conference arrangement, as well as the express language of the pipeline agreement, specifically do not require that new employees be cleared through the local unions and specifically provide that the employer can hire men directly, without going through the union.

Furthermore, the record clearly indicates that there was never an agreement between Respondent Union, or any of its officers, and the employer with respect to the necessity for clearing men brought into Contra Costa County as part of the work force recruited in other counties. The only agreement or *practice* testified to was to the effect that only certain specified supervisory employees of the employer would be permitted to place orders for new men with the union so that confusion would be eliminated in referring them to the job. In this case, it is also clear from the record that the charging parties were not requested by such specified supervisory employees. It is equally clear that men *already* employed could be brought into a new territory without the necessity of calling the local union.

The record is completely lacking in even a scintilla of evidence or testimony which would show that there was any agreement requiring clearances or that a demand for such was required by the Respondent Union or any of its officers. Similarly, the record is

bare of any evidence that the employer or the charging parties were in any way induced, coerced or threatened into such an agreement.

Actually, the testimony adduced at the hearing shows that the employers, as well as the charging parties themselves, worked for many days within the territorial jurisdiction of the Respondent Union without clearances both before and after February 8, 1957 and during such work no pickets were posted by the Respondent Union nor were the employers or employees threatened with the possibility of pickets, loss of jobs or loss of union status.

The testimony of all witnesses consistently establishes the fact that the Respondent Union did not request either the employers or the charging parties that the latter be cleared as a condition of employment; that the demand for clearance was initiated voluntarily by the employers themselves as a unilateral determination on their own part; that Respondents refused to give clearances because clearances were not necessary and the men could work without them. This evidence is unquestionably supported by the fact that the charging parties did in fact work in Contra Costa County without clearances.

Significantly, the testimony of the job supervisor, known as Cheeves, indicated that the policy of requiring clearances was initiated by the employer rather than the union or its officers and that on numerous occasions in Contra Costa County and elsewhere men worked under his supervision without such clearances.

The following corroborating testimony of Mr. Wilson, the vice president of the employer, indicates the complete falseness of the charge as well as the position taken by the Board:

“Q. Now, as I understand it, once a man was employed on the project and he went into the territory of another local union, there was no necessity that he obtain any local union clearance?

A. That is correct.

Q. And if a local union in another territory would refuse him a clearance, he would still keep on working, as far as this agreement was concerned?

A. Yes.”

(Reporter’s Transcript, page 20, last line to page 30, seventh line.)

The record and particularly the above excerpt is contrary to the statement contained on page 4 of the brief of the General Counsel that the “Company followed the practice of requiring all of its employees, upon extension of the pipe line into a new county, to be cleared . . .”. The brief, in this statement, does not state that the union requested or participated in this practice but tends to mislead this Court into believing that such was the case. Not only is such a practice unilateral on the part of the employer but the facts show that there was no such practice insofar as the Respondent Union is concerned.

The Board attempts to impress this Court with numerous references to supposed conversations but no amount of colloquy can obstruct the obvious fact that clearances were not required as a condition of

employment, either by practice or by agreement and if the employer wanted to employ the charging parties it would do so and, in fact, did so in this case without the prior condition of clearances.

Because of the present posture of this case and the unusual request of the Board to return this matter to it for further proceedings, it should be noted that the unfair labor practice charges and the complaint do not allege or charge that an exclusive hiring hall system or procedure was in existence and do not charge that there were discriminatory hiring hall practices. After the decision of the trial examiner, the Board waited more than a year before it rendered its decision. During this interval it rendered a decision in *Mountain Pacific Chapter of the Associated General Contractors, et al.*, 119 NLRB 883 (1957) which it then attempted to apply to the instant case even though the facts of the two disputes are totally dissimilar and even though the essential ingredients existing in the *Mountain Pacific* case, namely, an exclusive hiring system, clearly do not exist and were not alleged to exist here. This dispute involves persons who are already employed and who are transferred by the employer from one area to another.

OBJECTIONS TO REQUEST FOR REMAND.

In view of the foregoing, it becomes evident that the position of the Board in now, for the first time, requesting remand after it sought unqualified enforcement of its order in this case is improper and should

be denied. Not only is this request made some two and one half years after the alleged discriminatory incident but obviously the Board is attempting to return this matter so that it can be recharacterized and something made of it, which is not based on the record, and where its petition for enforcement is totally unsupported on the record and on the facts. Furthermore the record is absolutely void of any reference to testimony concerning hiring hall systems or exclusive hiring procedures and the existence of such a system or practice was admittedly not alleged by the Board at any time during the course of these proceedings. Accordingly, nothing which this Court stated in *Mountain Pacific* would be in any way applicable on remand.

I.

REASONS FOR OBJECTIONS TO REQUEST FOR REMAND.

As already stated, the Board takes the transparent position that this case should be remanded to it for further proceedings in view of this Court's remand in *NLRB v. Mountain Pacific Chapter, et al.*, F.2d (1959), even though the Board erroneously applies its decision in this case upon its improper decision in that case. The obvious defect in the General Counsel's position is contained in his own admission set out in footnote 2 on page 8 of his brief where it is stated "No unfair labor practice finding was made with respect to the exclusive hiring arrangement itself *since the complaint did not place it in issue* as an unfair labor practice. . . ." (Emphasis added.)

Obviously, the Board could not *now* find that an unfair labor practice exists when it did not allege its existence in its complaint and when no evidence was introduced in this respect by its own attorneys.

Clearly, the Board is attempting to inject a new element into what is an already "old" situation and is attempting to make something out of this case which simply does not exist. Much effort is expended in attempting to show the similarity between the *Mountain Pacific* case, *supra*, and the facts of this case but, by its own admission, the Board simply is engaging in conjecture far beyond the limits of the record because the questions of exclusive hiring hall procedures and whether or not they were discriminatory were not in issue.

II.

THE BOARD LACKS JURISDICTION IN THIS MATTER.

The Respondents, as stated previously, interposed a Motion to Dismiss for the reason that the National Labor Relations Board was arbitrarily and capriciously exercising its jurisdiction in an unfair labor case filed against a labor organization involved in the "building trades", while sumultaneously refusing to take jurisdiction in cases where such labor organizations were seeking the benefits of the Labor Management Relations Act.

The United States Supreme Court in *Office Employees International Union, Local No. 11 AFL-CIO v. NLRB*, 353 U.S. 313, 77 S. Ct. 799 (1957), held that

where the Board arbitrarily exercises its jurisdiction or refuses to exercise its jurisdiction, a fatal abuse of its discretion results. It cannot be doubted that the blanket exclusion of unions engaged in the building and construction industry as a class, insofar as beneficial provisions of the Act are concerned, is contrary to the mandate of the United States Supreme Court in this regard and Respondents' Motion to Dismiss should have been granted on that ground alone.

Since its decision in the *Office Employees* case, supra, the United States Supreme Court has, citing its decision in that case, again held that the Board cannot refuse to assert jurisdiction with respect to a class or segment of the economy, as is the case here. *Hotel Employees Local No. 255, et al. v. Leedom*, 79 S. Ct. 150 (1958).

The decisions of this Court in *N.L.R.B. v. Reed*, 206 F. 2d 184 (C.A. 9, 1953); *N.L.R.B. v. Daboll*, 216 F. 2d 143 (C.A. 9, 1954); *N.L.R.B. v. Local 743, Carpenters Union*, 202 F. 2d 516 (C.A. 9, 1953); and *N.L.R.B. v. Local 12, Operating Engineers*, 237 F. 2d 670 (C.A. 9, 1956), in no way support the contention of the General Counsel that there is no merit to the Respondents' contention that the assumption of jurisdiction by the Board in this manner is improper. The constitutional question with respect to the arbitrary assumption of jurisdiction by the Board was neither raised nor involved in any of those cases, all of which dealt with the primary jurisdictional conflict between state and federal tribunals and the application of the doctrine of de minimis.

The principles governing this case were clearly enunciated by the United States Supreme Court in the *Office Employees* case, *supra*, and should be applied here.

III.

THE RECORD FAILS TO ESTABLISH THE EXISTENCE OF AN UNFAIR LABOR PRACTICE OR VIOLATION OF ANY PROVISION OF THE ACT INsofar AS RESPONDENTS ARE CONCERNED.

Congress, at pages 21 and 22 of the Senate Report 105, 8th Congress, stated:

“Section 8(b)(2) . . . is designed to protect individual employees from discrimination in employment *induced* by a labor organization which has a union shop contract with the employer. . . . The labor organization may not persuade or attempt to persuade the employer to discriminate against except for two reasons: First, that the employee has lost his union membership by failing to tender the dues or initiation fees uniformly required as a condition of membership; second, that the employee, at the time when the Board would not entertain a petition to determine representation . . . has engaged in activity having as its objective the termination of the exclusive representative status of the union. It is to be observed that the unions are free to adopt whatever membership provisions they desire but they may not rely upon action taken pursuant to those provisions effecting the discharge of, or other job discrimination against, an employee excepting the two situations described.” (Emphasis added.)

Thus, the proscriptive provisions of the Act are directed at situations where the union *requires* clearances as a condition of employment and then refuses to issue them. *N.L.R.B. v. Local 743, Brotherhood of Carpenters*, 202 F. 2d 516, *supra*; *Pinkerton's National Detective Agency, Inc.*, 90 N.L.R.B. 205 (1950); *Paul W. Spear, Inc.*, 98 N.L.R.B. 212 (1952); *Utah Construction Co.*, 95 N.L.R.B. 196 (1951).

Obviously, as indicated by the record, the union did not induce the practice of clearances as a condition of employment, and if such a practice did exist, it was a unilateral requirement of the employer to which this Respondent clearly did not accede inasmuch as work was done and was being done in its territorial jurisdiction with its knowledge and without such clearances.

Contrary to the contention of the General Counsel the law governing clearances is explicit to the effect that an unfair labor practice occurs only when the union *causes* an employer to discriminate and to require clearances as a condition of employment. *Consolidated Western Steel Corp.*, 109 N.L.R.B. No. 136 (1954); *Grove, Shepard, Wilson & Kruge, Inc.*, 109 N.L.R.B. No. 21; *Mohawk Valley District Council, Brotherhood of Carpenters*, 109 N.L.R.B. No. 84 (1954); and *Columbus Showcase Co.*, 11 N.L.R.B. No. 33 (1955).

The unavoidable fact is that there was no such *causal* effect here and the record is without contradiction that the employer could, as a matter of general practice, and did, in the specific situation involved,

employ men without requiring clearances and that the refusal of clearances, if such were the case, would not have affected the employment relationship.

It is respectfully submitted that even if the record were clear that the Respondents had refused clearances to the charging parties there could be no question that they were justified in doing so for the issuance of clearances would have constituted a violation of the collective bargaining agreement.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the request of the Board that this matter be remanded to them for further proceedings should not be granted for it would permit the reopening of the factual background and would permit the Board to assert new and more drastic remedies. It is further submitted that the evidence fails to sustain the allegations of the charging parties as enumerated in the Consolidated Complaint and fails to sustain the findings, conclusions and order of the Board. Accordingly, the petition for enforcement should be denied.

Dated, San Francisco, California,
November 10, 1959.

CHARLES P. SCULLY,
VICTOR VAN BOURG,
Attorneys for Respondents.



No. 16,355 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

MATILDA M. BROOKS,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

HERBERT P. MOORE, JR.,

STARK & CHAMPLIN,

Financial Center Building,

Oakland, California,

Attorneys for Petitioner.

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Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF JURISDICTION.

This appeal involves deficiencies in income taxes of Matilda M. Brooks (hereinafter referred to as petitioner) for the years 1952 and 1953. Petitioner is an individual with place of residence at 630 Woodmont Avenue, Berkeley, California. The returns for the period here involved were filed with the Director of Internal Revenue for the First District of California in San Francisco, California, which office is located in the Ninth Circuit. A notice of deficiency regarding the years involved was mailed to petitioner on May 22, 1956 (Paragraphs 1 and 2 of petition admitted by respondent, R. 5, 18). Petitioner filed her petition for a redetermination of the deficiencies set forth in

said notice with the Tax Court on August 20, 1956 (petition set forth at R. 5-18). The Tax Court had jurisdiction under Sections 6213, 6214, and 7442 of the Internal Revenue Code of 1954 (26 U.S.C. 6213, 6214, 7442).

Decision of the Tax Court was entered against petitioner on September 30, 1958 (R. 39), and a petition for review of said decision by this Court was filed with the Tax Court on December 29, 1958 (R. 40-42). The appeal was timely (26 U.S.C. 7483) and this Court has jurisdiction to review said decision (26 U.S.C. 7481-7483).

STATEMENT OF THE CASE.

A. SUMMARIZED STATEMENT.

Petitioner is an accomplished research scientist with the University of California and in 1952 and 1953 it was necessary for her to travel to Europe to carry on her scientific work (necessity admitted in pleadings, R. 8, 19). She claimed travel expenses of \$2,988.00 for 1952 and \$3,685.20 for 1953 and expenses for membership in professional associations of \$26.00 for 1952 and \$39.00 for 1953, all as ordinary and necessary business expenses (R. 6). The Commissioner disallowed these expenditures as ordinary and necessary business expenses, but did allow them as charitable contributions subject to the 20% limitation of Section 23(o) of the Internal Revenue Code of 1939 (R. 12-15).

Petitioner also sustained casualty losses of \$11.59 for 1952 and \$15.00 for 1953 which were disallowed by the Commissioner, but which losses were admitted in the pleadings before the Tax Court (R. 9, 19).

Petitioner served the University of California as a scientist without salary prior to 1952, but during 1952 and 1953 she received annual salaries of \$749.96 and \$499.92 respectively (R. 26). Also, petitioner received \$1,000.00 from the University in 1952. Petitioner considered this sum to be a gift, but respondent by his amended answer contended that it constituted taxable income (R. 20, 104).

The Tax Court concluded that all of the casualty losses and professional society expenses were deductible as being connected with petitioner's employment as a scientist with the University, but denied deductibility of any portion of petitioner's travel costs either as expenses incurred in connection with her employment or as expenses incurred in connection with carrying on a trade or business as a professional scientist. The Court further held that the \$1,000.00 was not income (R. 37, 38).

B. DETAILED STATEMENT.

1. Introduction.

Petitioner directs her appeal only to the Tax Court's holding that no portion of her travel expenses are deductible. In so holding, the Tax Court refused to accept petitioner's contention that she was in a

“trade or business” of performing scientific research for profit because of its conclusion that her research had not produced an *overall net profit* and, in addition, that she didn’t have a sufficient *profit motive* in regard thereto. However, the Tax Court did commend petitioner for her scientific accomplishments and her desire to benefit mankind (R. 37). The Tax Court further refused to accept petitioner’s alternate contention that *all or at least a portion* of her travel expenses were ordinary and necessary expenses incurred in connection with maintaining her employment status with the University, but held that *all* of the casualty losses and professional society expenses were so incurred (R. 37, 38).

We feel that in order to aid this Court to properly appraise petitioner’s contentions, a rather detailed statement of all pertinent facts concerning petitioner’s life’s work as an accomplished research scientist is in order. Such detailed statement follows and for the most part merely repeats or rephrases the findings of the Tax Court. To the extent that such statement does not so repeat or rephrase such findings, we have endeavored to rely only on uncontradicted evidence.

2. Statement of Facts.

Petitioner now is, and at all times since the receipt of her Ph.D. in 1920, has been a scientist. She has been continually associated with the University of California at Berkeley, California, as a scientist since 1927, and her primary position with the University has been that of a research associate in the fields of

biology, zoology and physiology (portions of paragraph 5(a) of petition admitted by respondent at R. 7, 18; Stip. 1, 4, 5).¹

During her tenure at the University of California, petitioner performed valuable and important research and published her findings in regard thereto in many important scientific journals concerning such subjects, to name a few, as, the cause and cure of air sickness, treatment of cyanide and carbon monoxide poisoning, the Crocker Tumor, human reaction to altitude, and studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential. Also, her scientific work has been recognized by election to membership in such scholarly organizations as the Physiological Society, Phi Beta Kappa and Sigma Chi (a scientific society associated with Phi Beta Kappa); listing of her name in American Men of Science; and, radio dramatization of her work on March of Time and Ceilings Unlimited. (All of paragraph 5(b) of petition admitted by respondent at R. 7, 19; R. 83-87, 91; Ex. 5-E; R. F. 20, 30).

During the tax years in question, petitioner's primary research activities concerned studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential.

¹"R" is used to refer to the printed record. "Ex." is used to refer to exhibits, petitioner's exhibits being designated by numbers, respondent's by letters, and joint exhibits by numbers and letters. "Stip." is used to refer to the "Stipulation of Facts" contained at R. 21-26 and numbers following "Stip." refer to numbered paragraphs contained in Stipulation of Facts. "R.F." is used to refer to that portion of the record at which the findings of the Tax Court are set out.

Certain single cells grow only in certain parts of the world and, in order to adequately perform her research duties, it was necessary for petitioner to travel to Europe for the greater part of 1952 and 1953 (portions of paragraphs 5(c) and 5(d) of petition admitted by respondent at R. 8, 19; R. 88; R. F. 30). She expended the following sums in those years for her travel expenses to and from Europe, all of which expenses were necessitated by and incidental to her performance of such research there, to wit, \$2,988.00 in 1952, and \$3,685.20 in 1953 (conceded by respondent at R. 88; R. F. 30).

All of these travel expenditures were directly related to petitioner's research activities and to her profession in general, but, during the tax years in question herein, she derived no net profit from her research activities. However, petitioner profited by her research activities in past years and her testimony shows that she expects to derive a net profit therefrom in future years (Entire Record).

For six years after receiving her Ph.D. degree in 1920, petitioner worked in the Hygiene Laboratory of the United States Public Health Service, four of those years as an assistant biologist at a salary of approximately \$2,800.00 per year, and the last two years as an associate biologist at a salary of \$3,500.00 per year (Stip. 2; R. 57, 58). Her main research activity while with the Public Health Service concerned itself with the oxidation reduction potential of single celled animals and changes in the potential as affected by the penetration of various salts and dyes into the

single cells. The United States Government deemed it necessary and paid all expenses to send petitioner to Miami for eight months in 1922 and to Bermuda for one year in 1924, to study the oxidation reduction potential of certain cells that are found only in such places. This main area of research is still being carried on by petitioner and the expenditures made by petitioner in 1952 and 1953 were made in furtherance of this research activity (R. 58-60, 83, 84).

In 1927, petitioner's husband, Dr. Sumner C. Brooks, also a scientist, came to the University of California as a professor of zoology, which position he held until his death in 1948. In connection with said appointment as a professor of zoology, Dr. Sumner C. Brooks received a letter dated June 1, 1927, from Dr. C. A. Kofoed, chairman of the Department of Zoology of the University of California, wherein he stated that the department was greatly encouraged to believe that both the petitioner and the petitioner's husband would be able to come to the University and gave his assurance that petitioner, in coming to the University with her husband, would always have the opportunity for research and that a laboratory and other facilities, so far as at the department's disposal, would always be available for her (Stip. 3; R. 62; Ex. 14; R. F. 29).

Petitioner left the Public Health Service in 1926, and in 1927 accompanied her husband to the University of California where she was given an appointment as research associate in biology, without compensation. Petitioner served the University in that

capacity until 1949, except for two intervals, one in the fall of 1934, and the other from October, 1936 to June, 1937. During these intervals, her husband was on leave of absence without salary and she carried on his work under an appointment as lecturer in zoology, receiving the salary released by his leave as follows: for 1934, \$5,880.00; for 1936-37, \$3,472.00 (Stip. 4; Ex. 1-A; R. F. 29).

The reason that petitioner was given an appointment without salary was that the University has an anti-nepotism rule which forbids two members of one family to have a position in the same department (R. 62; Ex. 2-B), and the University's attitude toward petitioner's association with the University was that the University was obtaining two scientists for the price of one (R. 62; see also Ex. 4-D). During her husband's lifetime, petitioner, in addition to her independent research activities for the University, performed a substantial amount of his research for him, took charge of his duties when he was ill, read a scientific paper for him in London, co-authored a scientific book with him, and accompanied him to South America on a Government sponsored lecture tour, for none of which aid did she receive any "direct" remuneration from the University (R. 62-65).

In 1949, petitioner was appointed research associate in physiology, without compensation, which appointment she has continuously held since 1949, except as to the "without compensation" aspect thereof, which aspect was modified in 1952 (Stip. 5; R. F. 29). Until

the year 1952, the only sums of money received directly by petitioner from the University were in the form of research grants. In 1952, the University paid petitioner the gross amount of \$1,749.96 and, in 1953, the gross amount of \$499.92. Minutes of various meetings of the Regents of the University of California and various other official documents show the following information concerning such payments (R. F. 30-31):

(a) Petitioner's research required travel to Peru in 1947 and 1948, which travel expenses she claimed as deductions in those years. These deductions were thereafter questioned by the Commissioner, but petitioner believed them to be legitimate business deductions and had many discussions with the Commissioner from time to time concerning her 1947-1948 returns.² The dispute was still unsolved in January of 1952, at which time she brought her tax problems to the attention of the Regents of the University of California, at a January meeting, suggesting to them that her designation as an "employee," even though without salary, rather than as a "research assistant," would aid her tax status. The Regents disregarded her suggestion, but instead indicated at their second meeting, after receiving the President's report on petitioner's services to the University and her record as a scientist, that they were inclined to reimburse petitioner for her possible income tax deficiencies (R. 53; Ex. 4-D; Ex. 5-E; Ex. 6-F; R. F. 31).

²The Commissioner ultimately abandoned his position regarding the 1947-1948 returns (R. 109).

(b) Thereafter the University controller recommended that \$1,000.00 be allowed to petitioner based on estimated possible deficiencies of \$850.00 to \$900.00 for 1947-1948, and possible additional deficiencies for other past years, and, in addition, recommended petitioner's appointment, effective July 1, 1951, with an "annual stipend" of \$500.00, until severance of her connection with the University, predicated on the assumption that petitioner's work was valuable to the University (Ex. 8-H; R. F. 31-32).

(c) Pursuant to said recommendations, petitioner was paid \$1,000.00 by the University in 1952³ (Ex. 9-1; Ex. 13-M; R. F. 32) and was appointed research associate "with salary" at the rate of \$500.00 per annum for the academic year of July 1, 1951 to June 30, 1952, and the academic year of July 1, 1952 to June 30, 1953 (Ex. 10-J; Ex. 11-K; R. F. 32-33), which appointments provided, *inter alia*:

"Salary is subject to such deductions as may be required pursuant to applicable laws or regulations.

"In the event that my service does not continue throughout the year, the salary due me will be based upon the period of actual service, and I will return to the University such part of my salary as is not actually earned on this basis."

(Ex. 12-L; Stip. 5; R. F. 33).

Similarly worded appointments at the same salary rate were made for the academic year of July 1,

³This \$1,000.00 payment was held to constitute a gift by the Tax Court (R. 38).

1953 to June 30, 1954, and for all subsequent academic years (Stip. 5), and the records of earnings of the University show the following W-2 information concerning petitioner:

Calendar Year	Total Wages	Tax Withheld
1952	\$749.96	\$49.98
1953	499.92	99.96
1954	499.92	90.00
1955	499.92	90.00
1956	499.92	90.00

(Ex. 1-A; Stip. 5, 6; R. F. 33, 34).

Regarding the salary paid by the University during the tax years in issue herein and during subsequent years (which salary was paid to petitioner at the rate of \$41.66 per month, less withholding), petitioner at all times mentioned herein believed that she was required to carry on her research in order to receive such payments, did carry on her research and submitted annual reports of her research activities to the University. She believed and her appointment provided that if she terminated her research activities during an academic year, her monthly salary would also terminate (R. 77-78, 81-82, 100).

During her years of association with the University, petitioner received research support from many sources, among them, the National Academy of Sciences; the American Academy of Arts and Sciences; the National Research Council; the University of California; the American Philosophical Society; the Ella Sachs Plotz Research Fund; and

the Kappa Alpha Theta Fraternity (Ex. 5-E). Generally, the funds provided by these monetary research grants were expended on supplies, equipment, laboratory fees, salaries of laboratory assistants, and travel and living expenses, one of which travel and living expense grants provided for a trip to the South Seas to study cells found there. The monetary value of these various grants generally ranged from \$300.00 to \$900.00, with the exception of the travel and living expense grants and the Kappa Alpha Theta grant, which grant was in the amount of \$6,000.00. As the recipient of these monetary grants petitioner had control of the research performed and the application of the funds, so long as the funds were applied on the particular research project. However, except to the extent that such grants provided for living expenses, petitioner received no direct economic benefit therefrom (R. 66-70; R. F. 34).

Except when she was working for the Public Health Service, except to the extent that research grants paid her living expenses, except to the extent that she indirectly earned a portion of her husband's salary due to her aid in his work,⁴ except when she was substituting for her husband and earning his salary, and taking into account the \$500.00 per annum stipend paid by the University, petitioner has made no net profit from her scientific activities. Because her husband's earnings provided a living for the two of them

⁴The anti-nepotism rule forbade the university from directly compensating her (R. 61; Ex. 2-B).

and because her research grants minimized her expenditures for research, it is perhaps reasonable to conclude that until her husband's death in 1948, petitioner did not necessarily have a strong independent profit motive in regard to her research activities. In that regard, before coming to the University, petitioner was offered approximately \$9,000.00 per annum to become the head of the Physiology Department at Hunter College in New York City, but preferred to come to the University of California with her husband (R. 71, 92, 97-99; R. F. 35).

Since her husband's death in 1948, petitioner's profit motive in regard to her research activities became of greater magnitude. She was no longer provided a living through her husband's earnings. Even though the investment of his retirement fund in the stock market provided some income to her, she found it necessary to liquidate some of her holdings, some of which liquidations occurred during the tax years in question herein, and in so doing, diminished her annual income therefrom. She testified that through her research she was interested in the betterment of mankind, but contended that since the death of her husband and during 1952 and 1953, her primary motive was that of earning taxable income through her research activities. And, in that regard, there are hundreds of thousands of dollars available in this country for persons performing research—some in the form of partially taxable fellowships, and some in the form of salaries from various foundations such as, Guggenheim, Miller, Rockefeller and Ford, which

stipends range in the neighborhood of \$6,000.00 per annum (R. 102-104, 105-107).

Even though petitioner received no fellowships or salaries from these organizations during the tax years in question, petitioner testified of her expectation that by continuing her research activities and thereby maintaining her position in her field as a valuable performer of such research, opportunities for fellowships or salaries would present themselves. She was not studying for a higher degree or for a new profession, but she was merely continuing the same profession and same line of research related thereto that she has carried on since the granting of her doctorate in 1920 (Entire Record and R. 83-84, 92-104, 106-107; R. F. 35).

SPECIFICATION OF ERRORS.

1. The Tax Court erred in failing to find that all of petitioner's 1952 expenses of \$2,988.00 for travel and all of her 1953 expenses of \$3,685.20 for travel constituted ordinary and necessary expenses paid during the respective taxable years in carrying on a trade or business.

2. In the alternative, the Tax Court erred in failing to find that all of petitioner's 1952 expenses of \$2,988.00 and 1953 expenses of \$3,685.20 were ordinary and necessary expenses of travel, meals and lodging while away from home, paid by petitioner in connection with her performance of services as an employee of the University of California.

3. In the alternative, the Tax Court erred in failing to find that a reasonable proportion of such expenditures were ordinary and necessary expenses paid by petitioner in connection with her performance of services as an employee, and that a reasonable proportion is not less than the amounts of money received by petitioner from the University of California as compensation for professional services performed.

SUMMARY ARGUMENT OF THE CASE.

I. We submit that the uncontradicted evidence is that during 1952 and 1953 petitioner was engaged in the profession of performing scientific research for profit—that the lack of net profits from her profession during said taxable years is not determinative of the issue and that she had a sufficient profit motive to be deemed to be in a “trade or business.” And being so engaged,

A. That all of her travel expenses constituted ordinary and necessary expenses paid during the respective taxable years in carrying on a trade or business.

II. In the alternative, we submit that during 1952 and 1953 petitioner was employed by the University of California, and being so employed, was required, even though not expressly, to perform the research which caused her to travel to Europe; and

A. That all of her travel expenses were ordinary and necessary expenses of travel, meals and

lodging while away from home, paid by petitioner in connection with her performance of services as an employee; or

B. In the alternative, that a reasonable proportion of such expenditures were such ordinary and necessary expenses. And that a reasonable proportion is not less than the amounts of money received by petitioner in the respective taxable years as compensation for professional services performed.

ARGUMENT.

I. DURING 1952 AND 1953 PETITIONER ENGAGED IN THE PROFESSION OF PERFORMING RESEARCH FOR PROFIT.

The uncontradicted evidence is that during 1952 and 1953 petitioner's activities as a scientist constituted the carrying on of a trade or business. As stated in *Cornelius Vanderbilt, Jr.*, 16 TCM 1081, 1085 (1957):

"The term 'business' has been defined as 'that which occupies the time, attention, and labor of men for the purpose of livelihood or profit.' . . .

"Whether an occupation is carried on as a business for profit or whether it is carried on for recreation or pleasure is *largely a matter of the intent of the taxpayer* . . . And it is well established that the receipts and expenditures of an activity are of prime importance in determining whether the taxpayer's intention is to engage in a trade or business for profit . . . *However, an occupation will not be excluded from the classification*

of business merely because it actually results in a loss instead of a profit . . .” (Italics ours)

There is no question that petitioner’s scientific activities have exclusively occupied her whole “time, attention and labor” since the granting of her doctorate in 1920. Even though it may be argued that substantial evidence exists to support the conclusion that *prior* to her husband’s death in 1948 her primary motive in carrying on her scientific activities was not one of profit, we believe it is clear from the record that *after* her husband’s death her scientific activities were primarily motivated by profit.

There is nothing unique in our contention that petitioner’s intention may have changed upon the death of her husband. In *Cecil v. Commissioner*, 100 Fed. (2d) 896 (C.A. 4, 1939) [39-1 USTC 9247], it was held that upon converting the taxpayer’s personal residence into a park and museum, the taxpayer then became engaged in a trade or business. In that regard, the Court stated at page 901:

“In deciding the case on the view that the enterprise could not as a matter of law be considered a ‘business’ unless the taxpayer intended and expected a net profit, we think the Board adopted too narrow a concept of the word ‘profit’ as applied to the situation here presented. The taxpayer was not investing fresh capital in a new enterprise but was endeavoring to make presently owned property productive of new income.”

However, the uncontradicted evidence does not necessarily support the conclusion that petitioner had

no profit motive before her husband's death—at least, it is not clear from the record that she did not make a net profit from her profession of performing research during that period. There is scant direct evidence of her actual intent during that period, but the receipts and expenditures from an activity are well recognized factors in determining whether a profit motive exists and such factors in this case indicate that a profit motive was in fact present.

During her six years with the United States Public Health Service, she earned an aggregate salary of approximately \$18,200.00 (Stip. 2; R. 58), and her total profit from her profession during that period was probably greater in that the United States Government paid all of petitioner's expenses in sending her to Miami and Bermuda (R. 59).

Regarding the period of her association with the University prior to her husband's death, the only indication from the record that petitioner may have sustained a loss from her profession during that period is the perhaps permissible inference that she received no reimbursement for her travel expenses to Peru in 1947 and 1948 (R. 53, 75; Ex. 4-D). There is an equally permissible inference that at least a substantial portion of the balance of her research expenditures during that period, including travel expenses (e. g. South America, 1943-1944, R. 63; South Seas and Florida, R. 66), were covered by monetary research grants and that except for the period during which she traveled to Peru, petitioner in effect "broke even" (R. 66-70; Ex. 5-E).

On the profit side of the ledger, if petitioner had not married, she very well may have accepted the offered position of head of the Physiology Department at Hunter College at approximately \$9,000.00 per annum (R. 71). However, it is urged that her marriage produced a profit through her husband's earnings from the University and that her professional activities substantially contributed to the earnings of the marriage.⁵

The reason that petitioner was given an appointment without salary was that the University had an anti-nepotism rule which forbids two members of one family to have a position in the same department (R. 61; Ex. 2-B). The University's attitude toward petitioner's association with the University was that the University was obtaining two scientists for the price of one, and it is urged that the University did in effect benefit from the valuable professional activities of two scientists for the price of one (R. 62-65; see also Ex. 4-D, "In this particular case Mrs. Brooks' husband was a salaried employee and she worked with him").

It is clear from the record that petitioner performed valuable professional services for her husband and can take financial credit for a portion of his earnings (R. 62-65). In fact, petitioner was substituted in his place by the University during his leaves of absence and received the salary released by his leave

⁵The Tax Court apparently disregarded this point concerning participation in her husband's earnings because it refused to hear testimony relating to the amount of her husband's earnings (R. 65), which refusal we submit to be unreasonable.

(\$5,880.00 in 1934, \$3,472.00 in 1936-1937; Stip. 4; R. 63; Ex. 1-A).

In summary, it is submitted that the uncontradicted evidence requires the conclusion that during the period prior to her husband's death, petitioner carried on her professional occupation with an intent of profiting thereby, that her occupation did not produce a loss, but, in fact, produced a net gain.

Petitioner carried on her research activities with a noticeable, if not primary intent of making a profit from her profession *prior* to her husband's death. It would appear to be clear from the record that, notwithstanding the Tax Court's conclusion to the contrary (R. 38), this intent has not lessened, but has become predominant *since* his death. As stated in the *Vanderbilt* case (*supra* at page 1085), the question as to whether petitioner was carrying on a "trade or business" during 1952 and 1953 "is largely a matter of the *intent* of the taxpayer." (Italics ours.) Petitioner's present intent to make a profit from her profession is at least as strong as that attributed to Mr. Vanderbilt (R. 92-94, 98-107).

Whereas the necessity of engaging in writing and lecturing activities at a profit was not clearly apparent in Mr. Vanderbilt's case due to the substantial income he received from a trust and dividends (an average of approximately \$40,000.00 a year, *supra* at 1084), petitioner is no longer provided a living through her husband's earnings.⁶ Even though the

⁶"Since my husband is gone it is up to me to do something to help me keep on going in the way of a salary." (R. 98).

investment of his retirement fund has provided some income to her (R. 104), she has found it necessary to liquidate some of her holdings, some of which liquidations occurred during the tax years in question herein, and in so doing, has diminished her annual income therefrom. Petitioner cannot afford, nor does she intend to suffer, an overall loss from her professional occupation (R. 98, 99, 102-107).

In *Margaret E. Amory*, 22 BTA 1398, 1400 (1931), the Court held that owning a stable of race horses was a business and in commenting on the evidence stated:

“Petitioner testified that though possessing an independent income and not being, therefore, dependent on the success of the racing stable for a livelihood, she could not afford to suffer losses indefinitely. She negatived with vigor any suggestion that the racing stable was undertaken in whole or in part as a hobby.”

Petitioners' testimony cannot be deemed any less convincing.

The factor of continued losses over a period of time was also considered in the *Vanderbilt* case (*supra*). In that case, the taxpayer's aggregate loss from his business for the period 1949 to 1955 was in excess of \$160,000.00, and his ratio of business expenses to business receipts, during that period, except for 1955 which was a “profit year,” was approximately 5 to 1 (*supra* at 1084). In this case there is no evidence in the record (except perhaps that regarding the Peru expenses) of any history of loss prior to 1952 and

1953, and petitioner's travel expenses for those years totaled only \$6,673.20 (R. 87-89). No matter how the payments of \$749.96 in 1952 and \$499.92 in 1953 are characterized, it is clear that they represent income earned due to her professional activities. Petitioner's ratio of expenses to receipts in 1952 and 1953 was approximately $5\frac{1}{3}$ to 1.

The evidence clearly shows that petitioner had a bona fide profit motive in 1952 and 1953 in pursuing her research. Her losses for those years are no more detracting from the fact that she was carrying on a trade or business, than were the losses arising in the *Vanderbilt* case and the race horse cases (*Margaret E. Amory, supra*; *George D. Widener, et al.*, 8 B.T.A. 651, affd. 33 Fed. (2d) 833 (C.A. 3, 1929)).

In *Doggett v. Burnet*, 65 Fed. (2d) 191 (C.A.D.C., 1933) [3 USTC 1090], the taxpayer had expended approximately \$38,000.00 on the printing and advertising of a book she authored. To date, she had made little or no profit from the book and the ultimate profit was not necessarily certain. In holding that she was in a business the Court stated at 194:

“The proper test is not the reasonableness of the taxpayer's belief that a profit will be realized, but whether it is entered into and carried on in good faith for the purpose of making a profit, or in the belief that a profit can be realized thereon, and that it is not conducted merely for pleasure, exhibition, or social diversion.”

Petitioner testified that through her research she was interested in the betterment of mankind (R. 102, 103;

for which concession the Tax Court commended her. R. 37), but the evidence clearly shows that, at least since the death of her husband and during 1952 and 1953, her primary motive has been that of earning taxable income through her research activities (R. 92-99, 103-107). And, in that regard, there are hundreds of thousands of dollars available in this country for persons performing research — some in the form of partially taxable fellowships, and some in the form of salaries from various foundations, which stipends may range in the neighborhood of \$6,000.00 per annum (R. 92-94).

It cannot fairly be held that petitioner's motives are any less "bona fide" or her chance of profit any less certain or her activities any more akin to "pleasure, exhibition, or social diversion" than that of those persons who continually lost money in the "sport of kings," but were held to be in a trade or business. In the *Widener* case (*supra*), the Court stated at page 654:

"He began his stables with the idea that *he would come out even financially or make a profit. He was fond of horses and wanted an outdoor occupation. Each year the stables have been in operation the petitioner has sustained a loss thereon ranging from \$30,000.00 to over \$79,000.00.*" (Italics ours)

and at page 658,

"The winning of a single race or the *chance* purchase of a yearling *might* at any time convert

⁷Perhaps these horse fanciers justified their "occupations" on the basis that they were interested in the "betterment" of the breed.

steady losses into a net profit, and make it a successful business," (Italics ours)

The case of *Henry P. White*, 23 T.C. 90 (1954), affd. per curiam 227 Fed. (2d) 779 (C.A. 6, 1955) [56-1 USTC 9139] cert. den. 351 US 939, cited to us by respondent during pretrial conferences is clearly distinguishable in that there the taxpayer was the beneficiary of a \$2,000,000.00 trust, spent only part time in his ballistics laboratory which was not created until *after* becoming beneficiary of the trust, had losses for 17 years with no indication of any possible future gain and his loss ratio approximated 12 to 1.

The facts in this case are not unlike those found in the *Vanderbilt* case and cases cited therein and herein. Even though petitioner is not as wealthy as the taxpayers involved and instead has chosen a profession with which she may also "better mankind," we submit that those cases are authority for holding that during 1952 and 1953 petitioner was engaged in the profession of performing scientific research for profit.

A. All of Petitioner's Travel Expenses Are Deductible as Business Expenses.

Regarding petitioner's travel expenses of \$2,988.00 in 1952 and \$3,685.20 in 1953, it has been admitted in the pleadings that "In order to *adequately perform* her research duties, *it was necessary* to travel to Europe for the greater part of 1952 and 1953" (portions of paragraph 5(d) of petition admitted by respondent, R. 8, 19). It was conceded at trial that those sums were, in fact, spent for the aforementioned

research purposes (R. 87-89). The reasonableness of the amount of these travel expenses cannot be seriously questioned in light of the business deductions allowed by the Courts in the cases cited immediately above.

However, the respondent may argue here, as he did in the *Vanderbilt* case, *supra* at 1087-88, that these travel expenses were incurred in promoting petitioner into a new business. Petitioner testified to her belief that, by continuing her research activities and thereby *maintaining* her position in her field as a valuable performer of such research, opportunities for fellowships or other compensation would present themselves (R. 92). However, she is not trying to *increase* her reputation ("I am already known. I don't have to make myself known. I am known all over the world." R. 97). She was not studying for a higher degree, nor was she educating herself for a new profession, but she was merely continuing the same profession and same line of research related thereto that she has carried on since the granting of her doctorate in 1920 (Entire record and R. 83-84, 92-104, 106-107; R. F.35).

It is significant to note that the United States Government sent petitioner to Miami and Bermuda in the 1920's to perform the same general line of research as that pursued in Europe during 1952 and 1953 (portions of paragraph 5(c) of petition admitted by respondent at R. 8, 19; R. 58-60, 83, 84). It is also significant to note the Commissioner's somewhat more liberal attitude toward educational and research expenses evidenced by Sections 1.162-5 and 1.162-6 of

the Regulations adopted on April 3, 1958, by T. D. 6291:

“§1.162-5 Expenses for education. (a) Expenditures made by a taxpayer for his education are deductible if they are for education (*including research activities*) undertaken primarily for the purpose of:

(1) Maintaining *or* improving skills required by the taxpayer in his employment or other trade or business,” (Italics ours)

In light of the uncontradicted evidence, it is clear that the Tax Court’s only reasonable conclusion should have been that petitioner was engaged in a “trade or business” and that all of her travel expenses are deductible as being “ordinary and necessary expenses” incurred in connection therewith. This Court should so hold and modify the Tax Court’s decision accordingly.

II. IN THE ALTERNATIVE, PETITIONER WAS AN EMPLOYEE DURING 1952 AND 1953 AND REQUIRED TO PERFORM THE RESEARCH CAUSING THE TRAVEL EXPENSES.

Assuming that this Court should hold that petitioner was not engaged in a trade or business during 1952 and 1953, it is our alternative contention that she was an employee of the University and, being so employed, was *required* by her employment to perform research.

The University paid petitioner a lump sum of \$500.00 in June of 1952 for the academic year 1951-1952, \$249.96 in installments of \$41.66 per month for the last 6 months of 1952, and \$499.92 per annum in

similar installments thereafter (R. 100; Ex. 1-A; Stip. 6). These payments are shown on the Staff Record and Earnings Record of the University showing appointments of and payments made to petitioner (Stip. 5, Ex. 1-A), are designated as salaries or as a stipend on all documents relating thereto (Ex. 1-A; Ex. 8-H; Ex. 10-J; Ex. 11-K; Ex. 12-L), and with the possible exception of the \$500.00, were subject to withholding and termination if services were not performed (Stip. 6; Ex. 1-A).

Notwithstanding the University's designation of those payments as "a stipend . . . covering tax deficiency, disallowances of expenditures for research, on Federal Income Tax returns . . ." (Ex. 10-J; Ex. 11-K), the record would seem to clearly indicate that the University intended to pay petitioner a salary for performing professional services to the University. If such was not the University's *intent*, then these payments should be held to constitute gifts in recognition of past achievement and be excluded from petitioner's taxable income.

The Tax Court apparently concluded that petitioner was a salaried employee with the University (R. F. 36; R. 37-38). However, it held that only her casualty losses and professional society expenses were connected with her employment (R. 38). On the contrary, it would seem that the travel expenses bore a much closer relationship to the research which she performed at the University. It is therefore difficult for petitioner to understand how the Tax Court could logically conclude that the indirect research expenses

are deductible, but allow no portion of the direct research expenses to be deducted.

It is true that there is little evidence of the University's right to control petitioner, but it is submitted that this Court should take judicial notice of the fact that institutions of higher learning normally do not direct and control the research activities carried on by their employees who are in scientific fields as would be the case in classic employer-employee relationships. Petitioner has performed research activities throughout her adult life and it is not difficult to infer that she was paid these sums as an employee required to perform her research.

Petitioner believed that she was required to carry on her research in order to receive such payments,⁸ did carry on her research and submitted annual reports of her research activities. She believed that if she terminated her research activities during an academic year, her monthly salary would also terminate (R. 81-82).

It can be concluded that during 1952 and 1953 petitioner was an employee of the University and, in order to maintain that status, was required to continue her research activities.

A. All of Petitioner's Travel Expenses Are Deductible as Expenses of an Employee.

It cannot be disputed that petitioner must continue her association with the University in order to receive

⁸"Well, I was required to do research. . . . Otherwise I wouldn't have gotten the 500. . . ." (R. 81).

her annual salary and that in so doing, she is required to continue her research activities. The Tax Court found no express requirement that she perform research and travel to do so, the lack of such an "express requirement" apparently being deemed fatal by the Tax Court in this case (R. 37).

It is true that the lack of an express requirement has been deemed fatal to the taxpayer in cases such as that of *Manoel Cardozo*, 17 T. C. 3 (1951). However, the *Cardozo* case and cases cited therein are only authority for the proposition that when a person's profession is that of *teaching*, research expenses to increase his prestige and reputation for scholarship and learning, unless expressly required by his employer to maintain his position, are ordinary, but not necessary expenses. And it is noteworthy that the Commissioner has perhaps taken a more liberal approach to such cases in his recent regulations, as shown by the following example:

"E, a high school teacher of physics, in order to *improve* skills required by him and thus *improve* his effectiveness as such a teacher, takes summer school courses in nuclear physics and educational methods. E's expenses for such courses are deductible." (1954 Regs. §1.162-5, *supra*) (Italics ours)

Petitioner is not a *teacher*, but her profession is that of performing scientific *research*. This *requirement* to perform research is implicit in her status with the University. Universities do not, as believed by the Tax Court, "require" or "suggest" the method

by which scientists are to perform their chosen research projects. Petitioner is required to perform research, it has been admitted in the pleadings that it was *necessary* for petitioner to travel to Europe for the greater part of 1952 and 1953 in order to adequately perform her research duties, and it is submitted that these travel expenses are deductible in toto.

These travel expenditures were not "promotional" expenses as shown in petitioner's argument at I, A, page 25, *supra*. These expenses, at first blush, might appear excessive in relation to the salary payments received during 1952 and 1953. However, they are not necessarily recurring (the last expensive trip was in 1947-1948, i. e. Peru), and, overall, these expenses are reasonable.

B. A Reasonable Proportion of Petitioner's Travel Expenses Are Deductible as Expenses of an Employee.

If this Court should hold that the travel expenses are not deductible in toto, we submit that it would be unreasonable to allow less than the sum of \$749.96 in 1952, and the sum of \$499.92 in 1953, as ordinary and necessary expenses of travel, meals and lodging while away from home, paid by petitioner in connection with her performance of services as an employee (§22(n) (2)). She was paid these amounts because of her research activities and the Commissioner has included these amounts in her taxable income. She should be allowed to deduct her research activity expenses, at least to the extent of these payments.

In addition, it can be argued that in denominating these payments as "Salaries . . . to cover tax deficiency, disallowances of expenditures for research," the University intended to reimburse petitioner in part for her research expenses (Ex. 8-H; Ex. 10-G; Ex. 11-K). If such were the University's intent, then she should be entitled to deduct her travel expenses at least to the extent of the intended reimbursement.

CONCLUSION.

As stated in a recent law review article concerning tax problems of scholars,

"The sympathetic consideration shown recently by the Tax Court to tiger hunting dairy executives [*Sanitary Farms Dairy, Inc.*, 25 TC 463 (1955)] would seem an appropriate starting point for an investigation of the attitude of our federal revenue laws toward endeavors which have far greater impact on the course of our nation than Madison Avenue safaris." (Loring, *Some Tax Problems of Students and Scholars*, 45 Calif. L. Rev. 153 (1957))

It is a well known fact that thousands of dollars are spent and deducted by executives and salesmen each year on such items as dinner parties, football games, liquor and Florida and Las Vegas "conventions." These persons classically have a strong profit motive—they are doing their utmost to "better" their pocketbook.

Scholars and scientists are classically a different breed due to their intellectual environment and moti-

vations. However, they also must earn a living, surely, even though they have chosen a field in which "betterment of mankind" is sometimes more important than eating.

Are they to be penalized under the tax laws for enjoying their work? Are they to be penalized because their thirst for knowledge sometimes appears to overcome their desire for wealth? Such a penalty would seem inconsistent with our Government's present emphasis on science and education and thereby an unintended application of our tax laws.

By reason of the foregoing we submit that the record is clear and the evidence uncontroverted that petitioner is entitled under either theory of our case to deduct all or a substantial portion of her travel expenses and that the Tax Court's decision should be modified accordingly.⁹

Dated, Oakland, California,
June 24, 1959.

Respectfully submitted,

HERBERT P. MOORE, JR.,

STARK & CHAMPLIN,

Attorneys for Petitioner.

⁹As conceded by respondent, to the extent, if any, that the aforementioned expenditures are not allowed as expense deductions, they are allowable as charitable deductions pursuant to and as limited by § 23 (o) of the Internal Revenue Code (R. 54).

(Appendix Follows.)

Appendix.

Appendix

EXHIBITS A PART OF RECORD AND PAGE REFERENCES THERETO

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Exhibits 1-A through 12-L	R. 55
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Exhibit O	R. 56-57
Exhibit 14	R. 61-62
Exhibit 15	R. 69

**In the United States Court of Appeals
for the Ninth Circuit**

MATILDA M. BROOKS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF AND APPENDIX FOR THE RESPONDENT

ABBOTT M. SELLERS,
*Acting Assistant Attorney
General.*

**LEE A. JACKSON,
ROBERT N. ANDERSON,
KENNETH E. LEVIN,**
*Attorneys,
Department of Justice,
Washington 25, D. C.*

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AUG 20 1959

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16355

MATILDA M. BROOKS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 27-39) are reported at 30 T.C. 1087.

JURISDICTION

This petition for review (R. 40-42) involves federal income taxes for the years 1952 and 1953. On May 22, 1956, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency in the total amount of \$982.80. (R. 10-15.) Within ninety days thereafter and on August 20, 1956, the tax-

payer filed a petition with the Tax Court for a re-determination of the deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 3, 5-18.) The decision of the Tax Court was entered September 30, 1958. (R. 39.) The case is brought to this Court by a petition for review filed December 29, 1958. (R. 40-42.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the taxpayer, engaged for years as a research associate without salary at the University of California, and in the years involved here at an annual stipend of \$500, is entitled to deduct the expenses of a trip to Europe on the ground that they are ordinary and necessary business expenses incurred in carrying on a trade or business or that they are traveling expenses while away from home in the pursuit of a trade or business.

STATUTE INVOLVED

Internal Revenue Code of 1939:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In general.*—All the ordinary and necessary expenses paid or in-

curred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

STATEMENT

The taxpayer lives in Berkeley, California. At the time of the trial of this case she was in her sixth decade. She is a scientist and received a Ph.D. degree from Radcliffe College in 1920. For six years thereafter she worked in the hygiene laboratory of the United States Public Health Service, four of those years as an assistant biologist and the last two years as an associate biologist. In connection with her research activities while with the Public Health Service and thereafter she published the results in a number of publications. (R. 28.)

In 1927 the taxpayer's husband, Dr. Sumner C. Brooks, also a scientist, came to the University of California as a professor of zoology, which position he held until his death in 1948. At the time of his appointment as a professor of zoology, he received a letter dated June 1, 1927, from Dr. C. A. Kofoed, Chairman of the Department of Zoology of the University of California, wherein Dr. Kofoed stated: "I hope you can convince Mrs. Brooks that she would

have very full opportunity here for research. The facilities of the laboratory, in so far as they are at our disposal, would always be available for her." (R. 28-29.)

The taxpayer left the Public Health Service in 1926, and in 1927 accompanied her husband to the University of California where she was given an appointment as research associate in biology, without compensation. She served the university in that capacity until 1949 except for two intervals, one from October 17, 1934, to December 16, 1934, and the other from October 24, 1936, to June 30, 1937. During these intervals, her husband was on leave of absence without salary and she carried on his work, under an appointment as lecturer in zoology, receiving the salary released by his leave as follows: for 1934, \$5,880; for 1936-1937, \$3,472. In 1949 the taxpayer was appointed research associate in physiology, without compensation. (R. 29.)

During her connection with the University of California, the taxpayer performed valuable and important research and published her findings in regard thereto in many important scientific journals concerning such subjects, among others, as the cause and cure of air sickness, treatment for cyanide and carbon monoxide poisoning, the Crocker Tumor, human reaction to altitude, and studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential. Also, her scientific work has been recognized by her election to membership in such scholarly organizations as the Physiological Society; Phi Beta Kappa; Sigma

Xi; by the listing of her name in American Men of Science; and by radio dramatization of her work on March of Time and Ceilings Unlimited. (R. 29-30.)

During the taxable years the taxpayer's primary research activities concerned studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential. Certain single cells which she studied grow only in certain parts of the world and, in order to perform her research, she traveled in Europe during the greater part of 1952 and 1953. She expended \$2,988 in 1952 and \$3,685.20 in 1953 for her travel expenses to and from Europe, all of which expenses were incidental to her performance of research there. (R. 30.)

Until the year 1952 the only sums of money received by the taxpayer from the university were in the form of research grants. In 1952 the university paid her the gross amount of \$1,749.96 and in 1953 the gross amount of \$499.92. Minutes of various meetings of the Regents of the University of California and various other official documents show the following information concerning such payments (R. 30-31):

(a) The taxpayer traveled to Peru in 1947 and 1948, in connection with which she claimed deductions for travel expenses in those years. These deductions were thereafter questioned by the Commissioner. She claimed the expenses were required by her research activities and that the expenses were legitimate business deductions. She had many discussions with representatives of the Commissioner

from time to time concerning her 1947-1948 returns. The dispute was still unsolved in January of 1952, at which time she brought her tax problems to the attention of the Regents of the University at a January meeting, suggesting to them that her designation as an "employee", even though without salary, rather than a "research assistant", would aid her tax status. The Regents realized the impracticality of this suggestion, and indicated at their second meeting, after receiving the president's report on the taxpayer's services to the university and her record as a scientist, that they were inclined to reimburse her for her possible income tax deficiencies. (R. 31.)

(b) At a third meeting, held April 10, 1952, the Regents voted in favor of reimbursing the taxpayer in an amount not to exceed \$1,000 of her aggregate 1947-1948 proposed deficiencies, and requested the president to ascertain the exact amount thereof. In a letter dated May 6, 1952, the university controller recommended to the president that \$1,000 be allowed to the taxpayer based on estimated total possible deficiencies of \$850 to \$900 for 1947-1948, and possible additional deficiencies for other years, and in addition recommended her appointment, effective July 1, 1951, with an "annual stipend" of \$500, until severance of her connection with the university, predicated on the assumption that her work was valuable to the university. (R. 31-32.)

(c) At the meeting of May 23, 1952, the following budget transfer was made, without further comment, by the Regents:

(1) From the Regent's Emergency Fund to:

(a) Miscellaneous Expense: Supplies and Expense \$1,000.00 to cover tax deficiency disallowances on the 1947 and 1948 Federal Income Tax return of Dr. Matilda M. Brooks in accordance with the April 10, 1952 minutes * * *

On May 13, 1952, a request to issue a check to the taxpayer for \$1,000 "to cover deficiency disallowances on 1947 and 1948 Federal Income Tax Returns" was approved by the president, and on June 16, 1952, a check in that amount was issued to her. (R. 32.)

(d) At the meeting of June 19, 1952, the following budget transfer was made, without further comment by the Regents (R. 32-33):

(14) From * * * Searles Fund, to:

(a) School of Medicine: Physiology: Searles Fund: \$500.00 Salaries. To provide a stipend for Dr. Matilda M. Brooks to cover tax deficiency, disallowances of expenditures for research, on Federal Income Tax returns for 1951-52.

And, at an October meeting the following budget transfer was made (R. 33):

(5) From * * * Searles Fund to:

(a) School of Medicine: Physiology: Searles Fund: \$500.00 Academic Salaries. To provide stipend * * * covering tax deficiency, disallowances of expenditures for research, on Federal Income Tax returns for 1952-53.

(e) Pursuant to aforesaid budget transfers, the taxpayer was appointed Research Associate "with

salary" at the rate of \$500 per annum for the period July 1, 1951 to June 30, 1952, and the period July 1, 1952 to June 30, 1953, which appointments provided, *inter alia* (R. 33):

Salary is subject to such deductions as may be required pursuant to applicable laws or regulations.

In the event that my service does not continue throughout the year, the salary due me will be based upon the period of actual service, and I will return to the University such part of my salary as is not actually earned on this basis.

Similarly worded appointments at the same salary rate were made for July 1, 1953 to June 30, 1954, and all subsequent academic years, and the records of earnings of the University show the following W-2 information concerning the taxpayer (R. 33-34):

Year	Total Wages	Tax Withheld
1952	\$749.96	\$49.98
1953	499.92	99.96
1954	499.92	90.00
1955	499.92	90.00
1956	499.92	90.00

During the years of her association with the university, the taxpayer received research support from other sources, such as the National Academy of Sciences; the American Academy of Arts and Sciences; the National Research Council; the University of California; the American Philosophical Society; the Ella Sachs Plotz Research Fund; and the Kappa Alpha Theta Fraternity. Generally, the funds provided by these monetary research grants were ex-

pendent on supplies, equipment, laboratory fees, salaries of laboratory assistants, and travel and living expenses, one of which travel and living expense grants provided for a trip to the South Seas to study cells found there. The monetary value of these various grants generally ranged from \$300 to \$900, with the exception of the travel and living expense grants and the Kappa Alpha Theta grant, which was in the amount of \$6,000. As the recipient of these monetary grants, the taxpayer had control of the research performed and the application of the funds, so long as the funds were applied on the particular research project. However, except to the extent that such grants provided for living expenses she received no direct economic benefit therefrom. (R. 34.)

The Tax Court found that except when she was working for the Public Health Service, except to the extent that research grants paid her living expenses, except to the extent that she received the benefit of her husband's salary from the university, except when she was substituting for her husband and earning his salary, and taking into account the \$500 per annum stipend paid by the university, the taxpayer has made no net profit from her scientific activities. Because her husband's earnings provided a living for the two of them and because her research grants minimized her expenditures for research until her husband's death in 1948, the taxpayer did not have a strong independent profit motive in regard to her research activities. (R. 35.)

The Tax Court further found that during the taxable years the taxpayer received and asked for no

fellowships, grants or salaries from any of these organizations. She was not studying for a higher degree or a new profession. She was continuing research of the same character with which she was occupied in former years. The university did not require her to travel during the taxable years. In those years she was not in the business or profession of seeking grants or fellowships. Neither was she engaged on her own account in the profession of performing scientific research for profit. She was, however, an employee of the university at an annual stipend of \$500. (R. 35.)

The Tax Court held that the taxpayer's travel expenses in 1952 and 1953 were not ordinary and necessary expenses either in carrying on a trade or business or made in connection with her employment in the performance of services as an employee of the university. (R. 35-36.)¹

SUMMARY OF ARGUMENT

The Commissioner submits that the taxpayer's expenses incurred in European travel during 1952 and 1953 are not deductible because she was not carrying on a trade or business nor traveling in the pursuit of a trade or business within the meaning of Section

¹ The Tax Court also held, with respect to issues not involved on this review, that expenses of \$33.59 in 1952 and \$47 in 1953 were incurred in connection with the taxpayer's employment as a research associate of the University of California and were deductible, and that the \$1,000 paid to the taxpayer by the university in 1952 in order to reimburse her for income tax deficiencies in previous years was not taxable income.

23(a) (1) (A) of the Internal Revenue Code of 1939. The Tax Court's findings of fact to this effect were made in the course of its assigned function to weigh the testimony, observe the demeanor of the witnesses, and consider the documentary evidence, and should not be disturbed unless found to be clearly erroneous.

The criterion for determining whether or not an expenditure was incurred in the course of a trade or business is that the enterprise must have been undertaken with the intention of profiting from its operation. In determining whether or not this is the taxpayer's motive, the trial court may consider the entire factual background. Here the facts amply support the finding of the Tax Court that the taxpayer's scientific endeavors were not the result of a profit motive or of anything more than a hope that they might obtain for her, sometime in the future, a grant, a fellowship or a salary status. The facts show that the taxpayer has never been concerned with the amount of her income and since 1927 hardly concerned with earning an income at all. From 1927 to 1952, the taxpayer worked as a research associate at the University of California without any compensation at all except for two intervals of two months and eight months, respectively, when she substituted as a lecturer for her husband. The lump sum payment of \$1,000 received by the taxpayer and the annual stipend of \$500 commenced in 1952 were not requested by her and were not salary in the sense of compensation, but rather were intended to reimburse her for the disallowance by the Commissioner of certain deductions she had previ-

ously claimed. Although the taxpayer suggests that her motive may have changed after her husband died in 1948, the fact is that she continued as a research associate at the University of California without salary until the \$500 annual stipend commenced in 1952. Moreover, she rejected a suggestion on the part of some people who offered to get her a position at the University of Pennsylvania, presumably at a salary.

The taxpayer's assertions that she was motivated by a desire for profit are simply not reasonable in the light of the objective facts, and the Tax Court was not bound to believe such assertions under the circumstances. Moreover, the very testimony of the taxpayer herself indicates that in incurring the expenses involved here she had in mind some future profit by way of salary from a foundation or as a result of a possible publication rather than remuneration from her current employment. Hence her expenditures were in the nature of capital outlays rather than ordinary and necessary expenses in the operation of a trade or business.

Insofar as the taxpayer claims these deductions on the ground that she incurred traveling expenses as an employee, she must show that her status as an employee was sufficiently substantial to constitute a trade or business and that the travel was in fact required in that business or by her employer's business. For reasons already stated, she had no such business herself, and she has shown no requirement on the part of the university, or even any request, that she undertake the travel. Indeed for the uni-

versity to have asked the taxpayer to incur unreimbursable travel expenses of \$2,988 in 1952 and \$3,685.20 in 1953 would have been altogether unjustifiable and unreasonable in view of her meager annual stipend of \$500. The most that can be concluded is that the university allowed her to travel to Europe without withholding her annual stipend. Such are not the kind of travel expenses which employees are entitled to deduct.

ARGUMENT

Deduction of the Expenses Claimed By the Taxpayer Should Be Disallowed Because They Are Not Ordinary and Necessary Expenses Paid or Incurred In Carrying On a Trade or Business Nor Are They Traveling Expenses Incurred In the Pursuit of a Trade or Business

The taxable years involved in this case are 1952 and 1953, and while the taxpayer nowhere, either in the Tax Court or in her brief in this Court, asserts precisely under what provisions she claims these deductions, her argument is apparently directed to Section 23(a)(1)(A) of the Internal Revenue Code of 1939, providing as follows:

SEC. 23. DEDUCTIONS FROM GROSS INCOME

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in

carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

It will be seen that if the taxpayer claims the deduction under clause one of subparagraph (A), she must show that she was carrying on a trade or business, and if she claims the deduction under clause two of subparagraph (A), she must show that the traveling expenses were incurred in the pursuit of a trade or business. The position of the Commissioner is that in the tax years involved here, the taxpayer was not carrying on a trade or business or traveling in the pursuit of a trade or business, and that her expenses are therefore not deductible under either clause. The Tax Court found as facts (R. 35-36) that:

The university did not require her to travel during the taxable years. In those years she was not in the business or profession of seeking grants or fellowships. Neither was she engaged on her own account in the profession of performing scientific research for profit. She was, however, an employee of the university at an annual stipend of \$500.

Petitioner's travel expenses in 1952 and 1953 were not ordinary and necessary expenses either in carrying on a trade or business or made in connection with her employment in the perform-

ance of services as an employee of the university.

These findings of fact were made by the Tax Court in the course of its assigned function to weigh the testimony, observe the demeanor of the witnesses, and consider the documentary evidence. We submit that its findings in the light of all this are altogether reasonable and they should not be disturbed on appeal unless found to be clearly erroneous. *Kahn v. United States*, 251 F. 2d 160 (C. A. 9th), certiorari denied, 356 U.S. 918; *Wise v. Commissioner*, 260 F. 2d 354 (C. A. 6th); *Morton v. Commissioner*, 174 F. 2d 302 (C. A. 2d), certiorari denied, 338 U.S. 828.

The criterion for determining whether or not an expenditure was incurred in the course of a trade or business is that the enterprise must have been undertaken with the intention of profiting from its operation. *White v. Commissioner*, 23 T.C. 90, affirmed *per curiam*, 227 F. 2d 779 (C. A. 6th), certiorari denied, 351 U.S. 939; *Morton v. Commissioner*, *supra*; *Chaloner v. Helvering*, 69 F. 2d 571 (C. A. D.C.); *Coffey v. Commissioner*, 141 F. 2d 204 (C. A. 5th). In determining whether or not this is the taxpayer's motive, the trial court may consider the entire factual background, and is not bound to accept the testimony of an interested witness at face value, even though it is uncontroverted, if it is improbable, unreasonable, or questionable. Cf. *Quock Ting v. United States*, 140 U.S. 417, 420-421; *Ng Kwock Gee v. Dulles*, 221 F. 2d 942 (C. A. 9th); *Winters v. Dallman*, 238 F. 2d 912, 914 (C. A. 7th); *Hann v.*

Venetian Blind Corp., 111 F. 2d 455, 460 (C. A. 9th). In the instant case the Tax Court held that the taxpayer's scientific endeavors, so far as it could ascertain from the record (R. 37)—

were not the result of a profit motive or of anything more than a "hope" that they might obtain for her, sometime in the future, a grant or a fellowship or a salary status. They resulted from her curiosity, her desire to benefit mankind in whatever way she could, her innate drive as a "pure scientist" to find out as much as she could about her chosen field, all commendable in the highest sense, but in our opinion, without favorable tax consequences to petitioner.

The history of the taxpayer's adult life, as the taxpayer herself testified to it, clearly justified this conclusion of the Tax Court. It is apparent that the taxpayer has never been concerned with the amount of her income and since 1927 hardly concerned with earning an income at all. Thus, after receiving her Ph. D. degree, she worked for the Public Health Service for four years as an assistant biologist at \$2,800 per year and two years as an associate biologist at \$3,500 per year. (R. 57-58.) Thereafter the taxpayer was married and, rejecting an offer of \$9,000 to become head of the physiology department at Hunter College in New York (R. 71), chose to accompany her husband, who was appointed a professor at the University of California.² In 1927 the

² The taxpayer hints (Br. 19) that the salary paid by the university to her husband was not payment for his services alone, but rather for the services of both, and that the only

taxpayer became a research associate there, without compensation, serving in that capacity until 1949, with the exception of two intervals of two months and eight months, respectively, during which the taxpayer substituted for her husband under an appointment as lecturer in zoology and received his salary. In 1949 the taxpayer was appointed research associate in physiology and held that appointment without compensation until 1952. (R. 23.) Thus, with the exception of two short periods, the taxpayer engaged in biological research at the University of California for twenty-five years without compensation.

In 1952, the taxpayer received a lump sum payment of \$1,000 from the university and began to receive an "annual stipend" of \$500. The purpose of the \$1,000 payment was to reimburse the taxpayer for tax deficiencies which had been asserted against her due to the disallowance of certain travel expense deductions she had claimed in her 1947 and 1948 returns. (R. 32; Ex. 9-I, Appendix, *infra*.) The purpose of the \$500 annual stipend was to reimburse the taxpayer for the disallowance from other tax returns of deductions claimed for expenditures on research. (R. 32-33; Exs. 10-J, 11-K, Appendix,

reason she did not receive a separate salary was on account of the university's anti-nepotism rule. There is no suggestion in the evidence, however, that the university would have withdrawn its offer to the taxpayer's husband had she decided not to accompany him. On the contrary, the implication of the letter from the university is that her husband had decided to go there in any event, and that the university merely hoped that the taxpayer would come along. (Ex. 14, Appendix, *infra*.)

infra.) Similarly worded appointments at the same salary rate were made for all subsequent academic years. (R. 33.) The taxpayer's return for 1952 shows that in that year she also had dividend income of \$2,920.90, interest income of \$50.66, a capital gain of \$898.57, and income from real estate of \$1,181.56, a total of \$5,051.69 from sources other than scientific research. Her return for 1953 shows dividend income of \$3,346.87, interest income of \$78.78, a capital loss of \$1,000, and income from real estate of \$1,848.51, a total of \$4,274.16. The taxpayer also testified that she had received various grants for research purposes. (R. 66-70.)

This was the entire evidence with respect to the taxpayer's income from the time she entered the Public Health Service in 1927 through the tax years 1952 and 1953 involved here. On the basis of it, the taxpayer would have this Court say that the Tax Court clearly erred in refusing to hold (R. 37)—

that in conducting her research she was ever doing so as a "trade or business" or that she was performing her research for "profit".

We respectfully submit that the Tax Court could not logically have arrived at any other conclusion than it did. Here is a woman who in 1927 rejected an offer to head the physiology department at Hunter College at \$9,000 per year in order to become a research associate at the University of California at a salary of zero. Except for the periods of two months and eight months, respectively, when she substituted for her husband, she remained in this non-

salaries category at the university until 1952. At that time the university gave her a lump sum of \$1,000 which the Tax Court has now held not taxable to her because she never asked for it, did nothing to earn it, and because the university gave it to her only to help her meet income tax difficulties from previous years. (R. 38.) The annual \$500 stipend was also commenced in 1952 in order to help the taxpayer meet income tax problems arising from the disallowance of previously claimed deductions. Thus, none of these payments to the taxpayer were salary in the sense of profit or compensation for work done, but rather in the nature of reimbursement for non-deductible expenditures made by the taxpayer. Cf. *United States v. Woodall*, 255 F. 2d 370 (C. A. 10th), certiorari denied, 358 U.S. 824. Moreover, at best they constituted a small percentage of the total income reported by the taxpayer in 1952 and 1953.

In the face of all this evidence indicating a lack of profit motive on the taxpayer's part, the taxpayer points to the aggregate salary of approximately \$18,200 which she earned in the Public Health Service. (Br. 18.) It should be noted, however, that this employment occurred between the years 1920 and 1926. (R. 57.) Whatever the taxpayer's motives may have been at that time, the remoteness of the period renders it irrelevant.

As to the period of the taxpayer's association with the University of California prior to her husband's death, the taxpayer asserts that the record fails to indicate that she sustained a loss. The important

fact, however, which the taxpayer was bound to prove, is not whether she sustained a loss, but rather that she had a profit motive, and as to that the record is clear that she did not.

The taxpayer asserts that whatever may have been her motive prior to her husband's death in 1948, thereafter her activities were primarily motivated by profit. We submit, however, that the record suggests no such change in motive at all. On the contrary, in 1949 she accepted a new appointment as research associate in physiology, without salary just as before. (R. 23.) It was not until 1952 that the university, without any request from her, gave her \$1,000 plus the annual stipend of \$500 as a reimbursement for disallowed income tax deductions.³ It is noteworthy also that the taxpayer by her own admission voluntarily remained at the University of California under these circumstances, although after her husband passed away, some people at the University of Pennsylvania offered to get her a position there, presumably at a salary. (R. 71.) Furthermore, the taxpayer admitted that through the years 1952 and 1953 she had not yet made a profit from her activities. (R. 92.) Compare *Morton v. Commissioner*, *supra*; *Coffey v. Commissioner*, *supra*; *Cheney v. Commissioner*, 22 B.T.A. 672.

There are several difficulties which vitiate the effectiveness of the taxpayer's assertions that she

³ All that the taxpayer asked of the university in 1952 was that it designate her as an employee, even though without salary, because she believed that this would result in allowance of her claimed deductions for travel expenses. (Ex. 6-F, Appendix, *infra*.)

intended to make a profit. The first is that the Tax Court judge, well toward the conclusion of the taxpayer's testimony, simply did not believe that that was her motive, and voiced his opinion in open court. (R. 98.) Having heard the testimony and had an opportunity to observe the witness, this conclusion on his part was thoroughly justified and constituted the exercise of the very prerogative which is reserved to the trial judge. Certainly his failure to believe that the taxpayer was motivated by a desire for profit was not unreasonable in view of all the objective facts cited above which indicated practically no concern for profit on the taxpayer's part. The taxpayer may well have become more concerned about the subject of her income following her husband's death, but this was not reflected in any objective change whatever with respect to the taxpayer's research activities.

A second reason why the Tax Court judge could not possibly have given effect to the taxpayer's protestations of intention to profit in pursuing biological research, and particularly in incurring the travel expenses involved here, is that the taxpayer's testimony itself shows that she had in mind some future profit by way of salary from a foundation (R. 92-94) or as a result of a possible publication (R. 98.)⁴

⁴ The taxpayer testified as follows (R. 92) :

Q. Now, Dr. Brooks, so far, at least, in the years 1952 and 1953 you have not made what we would call a net profit from your activities?

A. That's right.

Q. How, if at all, do you expect to make a profit from

There was no evidence whatever that the taxpayer expected or received any particular remuneration from her current employment as a result of her travel expenditures or that any travel was required in order for her to retain her position at the University of California.⁵ Whatever profit motive she may have had in undertaking this travel related wholly to some possible future employment. In fact the expenditures were, like those in *Welch v. Helvering*, 290 U.S. 111, 115, "closer to capital outlays than to ordinary and necessary expenses in the operation of a business". In that case, the Supreme Court cited as an example of an expenditure which would not

your research activities in the future?

A. Well, I am hoping that—you see, there are a great many foundations now, many more than there used to be, and I am hoping that by keeping up my activities in this line of work and also in publishing along these lines that I will [51] be able to attract some funds from some of these foundations as salary, because they give large amounts, up to, I think, 7,000; 5,000; 7,000 in certain cases. And I am hoping to be able to be—to attract some of that money.

The Court: As salary?

The Witness: As salary, yes.

And further (R. 98):

* * * what I want to do is to keep my scientific ability on a good level so that if I do publish something, which I am doing all along, it will attract some money for some salary. That's the point.

⁵ The Commissioner's admission in his answer (R. 19) that "in order to adequately perform her research duties, it was necessary for her to travel to Europe for the greater part of 1952 and 1953" is not tantamount to an admission that the travel was required by the university in order for the taxpayer to retain her position as research associate, and the Tax Court so found. (R. 35.)

be an ordinary and necessary business expense that of a man who conceives the notion that he will be able to practice his vocation with greater ease and profit if he has an opportunity to enrich his culture. Therefore he attempts to deduct the price of an education as an expense of the business. But reputation and learning, said the Court, are akin to capital assets. And further (pp. 115-116):

For many, they are the only tools with which to hew a pathway to success. The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business.

The situation of the taxpayer here, by her own testimony, is comparable to the Supreme Court's example. It is also substantially like that in *Osborn v. Commissioner*, 3 T.C. 603, where the taxpayer was an unsalaried associate professor on the Yale faculty engaged in literary research for the preparation of three scholarly works. He incurred expenses of printing, research and clerical assistants, stationery, index cards, etc. of \$6,661.17. He did not expect to derive an immediate profit, but rather hoped to make himself eligible for a highly remunerative professional appointment such as a college president, and to receive income from the publications over a period of future years. The Tax Court disallowed the taxpayer's claimed deduction of his expenses, citing *Welch v. Helvering*, *supra*, and said (p. 605):

The expenses incurred in preparing himself are in essence the cost of the capital structure from which his future income is to be derived. They

are not ordinary and necessary expenses of carrying on a trade or business.

See also *Cardozo v. Commissioner*, 17 T.C. 3. The taxpayer's situation is to be contrasted with *Marlor v. Commissioner*, 251 F. 2d 615 (C. A. 2d); and *Hill v. Commissioner*, 181 F. 2d 906 (C. A. 4th), in which the deduction of certain expenses of education was allowed because the additional education was essential to the taxpayers' retention of their respective current employments.

As an alternative to her argument that the travel expenses involved here constituted ordinary and necessary expenses incurred in carrying on a trade or business, the taxpayer argues that they are deductible because "she was an employe of the university and, being so employed, was *required* by her employment to perform research". (Br. 26.) But if, indeed the taxpayer was an employee of the university, the important consideration is whether her status as an employee was sufficiently substantial to constitute a trade or business of the taxpayer and whether the travel was in fact required in that business or by her employer's business. For reasons already stated she had no such business herself, and there is nothing to show that the university required, or even requested, that the taxpayer undertake this travel in pursuance of its interests. Indeed for the university to have requested the taxpayer to incur unreimbursable travel expenses of \$2,988 in 1952 and \$3,685.20 in 1953 would have been altogether unjustifiable and unreasonable in view of her meager annual stipend of \$500. The most that can be con-

cluded is that the university allowed her to travel to Europe without withholding her annual stipend. Such are not the kind of travel expenses which employees are entitled to deduct. *Cardozo v. Commissioner, supra*; *Osborn v. Commissioner, supra*.

Under Section 23(o) of the 1939 Code, the Commissioner has previously allowed these travel expenses as a deductible contribution to the university to the extent that they do not exceed 20 per cent of the taxpayer's adjusted gross income in each taxable year. Except for this allowance, the taxpayer's suggestion (Br. 30-31) that she should be allowed to deduct a portion of her travel expenses, if not all, is without basis in law. Since they were all incurred in connection with the same travel, they are deductible under Section 23(a)(1)(A) either in full or not at all. Whether or not the payments by the university to the taxpayer were intended as partial reimbursement has no bearing on the non-deductibility of her expenditures. *United States v. Woodall*, 255 F. 2d 370 (C. A. 10th), certiorari denied, 358 U.S. 824.

CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

ABBOTT M. SELLERS,
*Acting Assistant Attorney
General.*

LEE A. JACKSON,
ROBERT N. ANDERSON,
KENNETH E. LEVIN,
*Attorneys,
Department of Justice,
Washington 25, D. C.*

August, 1959.

APPENDIX

(Exhibit 6-F)

Minutes of Regents' Finance Committee Meeting,
March 13, 1952

INCOME TAX PROBLEMS—MRS. MATILDA BROOKS:

30. Concerning the income tax problems of Mrs. Matilda Brooks, President Sproul presented the following report:

At the meeting of the Committee on January 31, 1952, Mr. Landon, of the Attorney's Office, presented an income tax problem of Mrs. Matilda Brooks, Research Associate in the Department of Physiology. The Committee deferred action pending a report on Mrs. Brooks' services to the University and her record as a scientist, which was mailed to members of the Committee on March 5.

#11—March 13, 1952

As this report indicates, Mrs. Brooks has been a non-salaried Research Associate for most of the past 20 years. Her research required extensive travel, and she claimed her travel expenses as income tax deductions on her 1948 return. These deductions have been disallowed on the ground that she was "not engaged in business or doing work for profit."

Mrs. Brooks is of the opinion that her designation by the Regents as an employee of the University, even though without salary, would result in an allowance of the deductions for travel expenses. Mr. Landon states his opinion that no re-determination or restatement of the employee status of Mrs. Brooks will be of any

material assistance in the improvement of her income tax status, since the taxing authorities and the courts will rule that she would not be entitled to the travel expense deductions even though she were declared to be an employee of the University.

Mr. Landon further suggests that, under the circumstances, perhaps the best practical solution is for The Regents to reimburse Mrs. Brooks for the amount of her several income tax deficiencies. He says that there is no legal bar to such action on the part of The Regents.

The President asked whether, in principle, the Committee would approve the reimbursement of Mrs. Brooks as suggested by Mr. Landon. If so, he would ascertain the amount involved and discuss the matter with her.

The members of the Committee were inclined to favor the proposal, but did not wish to take any definite action until the President had ascertained the amount of Mrs. Brooks' several income tax deficiencies.

(Exhibit 9-I)

San Francisco, California
May 23, 1952

A meeting of the Committee on Finance and Business Management was held this day at 11:00 a.m. in 910 Crooker Building, San Francisco.

Present: Regents Neylan, Heller, Fenston, McLaughlin, Pauley, and Sproul.

In attendance: Regents Hansen, McFadden, Naffziger, Steinhart, and Toll, Mr. Warren Crowell, Vice-President—Business Affairs Corley, Attorney Calkins, Controller Lundberg, Assistant Secretary and Assistant Treasurer Mallory, Assistant Secretary Woolman, Engineer Weaver, Architect Evans, Dean Warren, Superintendent of Hospitals Stull, Mr. Roy Ploss, Mr. Richard Neddersen, and Mr. Maynard Morris.

The minutes of the meetings of May 1 and 8 were approved as submitted.

BUDGET TRANSFERS:

O. The Committee concurs with the President in recommending the following budget transfers:

I recommend transfers as follows:

(1) From the Regents' Emergency Fund to:

- (a) Miscellaneous Expense: Supplies \$1,000.00 and Expense To cover tax deficiency disallowances on the 1947 and 1948 Federal Income Tax Return of Dr. Matilda M. Brooks in accordance with the April 10, 1952 minutes of the Committee on Finance and Business Management.

(Exhibit 10-J)

Confidential

San Francisco, California
June 19, 1952

A meeting of the Committee on Finance and Business Management was held this day at 2:30 p.m. in 910 Crocker Building, San Francisco.

Present: Regents Neylan, Heller, Ahlport, Fenston, McLaughlin, and Sproul.

In attendance: Vice-President—Business Affairs Corley, Attorney Calkins, Secretary and Treasurer Underhill, Controller Lundberg, Assistant Secretary Woolman, and Engineer Weaver.

#9—June 19, 1952

BUDGET TRANSFERS:

I. The Committee concurs with the President in recommending the following budget transfers:

(14) From Endowment Income Unallocated—Searles Fund, to:

- (a) School of Medicine: Physiology: \$ 500.00
Searles Fund: Salaries To Provide
a stipend for Dr. Matilda M. Brooks
to cover tax deficiency, disallow-
ances of expenditures for research,
on Federal Income Tax returns for
1951-52.

(Exhibit 11-K)

San Francisco, California
October 1, 1953

A meeting of the Committee on Finance was held this day at 2:30 p.m. in Room 910 Crocker Building, San Francisco.

Present: Regents Heller, McLaughlin, Nimitz and Steinhart.

In attendance: Secretary and Treasurer Underhill, Attorney Calkins, Vice-President—Business Affairs Corley, Vice-President—University Extension Woods, Assistant Controller Stevens, Assistant Secretary and Assistant Treasurer Mallory, Director Revelle, Dean Fleming, Mr. Henry Waring, Mr. James Miller, Messrs. Groff, Livesey, Rowlands and Webber of the Budget Office, Assistant Secretary Woolman.

BUDGET TRANSFERS:

E. The Committee concurs with the President in recommending the following budget transfers:

BERKELEY CAMPUS

(5) From Endowment Income Unallocated: Searles Fund to:

(a) School of Medicine: Physiology:

Searles Fund: Academic Salaries	\$ 500.00
To provide stipend for Dr. Matilda M. Brooks, covering tax deficiency, disallowances of expenditures for research, on Federal Income Tax returns for 1952-53.	<u> </u>

(Petitioner's Exhibit 14)

University of California
Department of Zoology
Berkeley, California

June 1, 1927

Professor S. C. Brooks,
Rutgers College,
New Brunswick, New Jersey.

Dear Professor Brooks:

I have your letter of May 2d. To make certain that we get your courses into the forthcoming Announcement of Courses, please forward them to us tentatively by air mail so that you can verify their entrance into the schedule by telegram when you have reached your decision, should this be favorable.

Anything you may ask about equipment for your research we should be glad to answer, and to put the machinery in motion so as to have it on hand in so far as it is feasible to do so without consultation on the ground.

I hope you can convince Mrs. Brooks that she would have very full opportunity here for research. The facilities of the laboratory, in so far as they are at our disposal, would always be available for her. At present we are crowded, but our plans for our new building are rapidly shaping up so that we hope to have abundance of room in it with aquaria, vivaria, animal houses, and other facilities that assist in research. If you also wish to make application to the Research Board for a grant for the ensuing academic year in support of your research it would be feasible for it to receive consideration, as we have

a balance on hand to meet such emergencies as your case will present.

We are greatly encouraged to believe that you both will find it feasible to come to us.

With kind regards,

Sincerely yours,

(Signed) O. A. Kofold



No. 16355

United States
Court of Appeals
for the Ninth Circuit

MATILDA M. BROOKS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED
APR 16 1959
PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HERBERT P. MOORE, JR.,
STARK & CHAMPLIN,

801 Financial Center Building,
Oakland 12, California,

Attorneys for Appellant.

CHARLES K. RICE,
Assistant U. S. Attorney General,

LEE A. JACKSON,
Attorney,

Department of Justice,
Washington 25, D. C.,

Attorneys for Appellee.

The Tax Court of the United States

Docket No. 63936

MATILDA M. BROOKS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1956

Aug. 20—Petition received 8/24/56. Taxpayer notified. Fee paid.

Aug. 27—Copy of petition served on General Counsel.

Aug. 20—Request for Circuit hearing in San Francisco, Calif. filed by Petr. 8/27/56—Granted. Served 8/27/56.

Sept. 17—Answer filed by Resp. Served 9/20/56.

1957

Oct. 22—Notice of Trial—Jan. 20, 1958, at San Francisco.

1958

Jan. 23—Trial had before Judge Tietjens on the merits and Resp. oral motion to amend pleading and to conform to proof—(Objection by Petr.) Petr.'s oral motion to answer. Motions Granted. Stip. of Facts with Exhibits and appearance of Herbert P. Moore, Esq. filed at hearing. Briefs due 3/24/58; Replies due 4/23/58, Amendment to answer filed at trial and served.

1958

Feb. 20—Transcript of Proceedings Jan. 23, 1958 filed.

Mar. 19—Motion by petr. for extension of time to April 8, 1958 to file brief. Granted 3/19/58. Served 3/21/58.

Apr. 7—Motion by petr. for extension of time to April 21, 1958 to file brief. Granted 4/7/58. Served 4/9/58.

Apr. 8—Brief for Resp. filed. Served 4/22/58.

Apr. 21—Brief for Petr. filed. Served 4/22/58.

May 6—Reply Brief for Resp. filed. Served 5/23/58.

May 21—Reply Brief for Petr. filed. Served 5/23/58.

Aug. 18—Findings of Fact and Opinion filed. Judge Tietjens. Served 8/18/58.

Sept. 23—Agreed Computation filed.

Sept. 30—Decision entered—Judge Tietjens.

Dec. 29—Petition for Review by U.S.C.A. 9th Circ. filed by petr.

Dec. 29—Proof of Service of Petition for Review filed.

1959

Jan. 19—Designation of contents of record on rev. with proof of service thereon, filed.

Jan. 19—Statement of Points with proof of service thereon, filed.

Jan. 19—Proof of service of designation and statement of points filed.

Jan. 20—Designation of additional portions of record on rev. filed, with proof of service thereon.

[Title of Tax Court and Cause.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (correspondence symbols Ap:SF:AA:JEH 90-D:HCM) dated May 22, 1956, and as a basis of his proceeding alleges as follows:

1. That petitioner is an individual with place of residence at 630 Woodmont Avenue, Berkeley, California. The returns for the period here involved were filed with the Director of Internal Revenue for the First District of California in San Francisco, California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on May 22, 1956.

3. The deficiency as determined by the Commissioner is in income taxes for the calendar years, 1952 and 1953. The alleged deficiency for 1952 is in the amount of \$473.10 and that alleged for 1953 is in the amount of \$509.70. The total amount of the alleged deficiencies for both years is in dispute herein.

4. The determination of the tax for the respective years in question herein set forth in the said notice of deficiency, is based upon the following errors:

(a) In determining the taxable income of the

petitioner for the years of 1952 and 1953, the Commissioner erroneously disallowed a deduction of \$3,025.59 for 1952 and a deduction of \$3,739.20 for 1953, both of which deductions represent ordinary and necessary expenses paid or incurred during the respective taxable years in carrying on a trade or business. The Commissioner contends that said deductions should be disallowed in toto.

(b) In the alternative, that in determining the taxable income of the petitioner for the years of 1952 and 1953, the Commissioner disallowed in toto a deduction of \$3,739.20 for 1953 and a deduction of \$3,025.59 for 1952, a reasonable portion of both of which deductions represent ordinary and necessary expenses paid or incurred during the respective taxable years in carrying on a trade or business, and that such a reasonable portion is no less than \$750.00 for the year 1952 and no less than \$500.00 for the year 1953. The Commissioner has refused to allow any portion of said expenses as deductions.

(c) In the alternative, that in determining the taxable income of the petitioner for the years of 1952 and 1953, the Commissioner erroneously disallowed a deduction of \$26.00 for 1952 and \$39.00 for 1953, both of which amounts were paid to professional organizations and represent ordinary and necessary expenses in carrying on a trade or business; and the Commissioner further erroneously disallowed a deduction of \$11.59 for 1952 and \$15.00 for 1953, both of which amounts represent casualty

losses not compensated by insurance or otherwise. The Commissioner disallowed all of these deductions on the ground that they did not represent ordinary and necessary expenses paid or incurred during the respective taxable years in carrying on a trade or business.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Matilda M. Brooks, hereinafter referred to as petitioner, now is and since 1927 has been a member of the faculty of the University of California. Petitioner is a scientist and holds the degree of Doctor of Philosophy. During the period of her association with the University of California, her primary position has been as a research associate in the fields of biology, zoology and physiology. However, in addition to such duties as a research associate, she has performed the duties of an instructor and has been a member of committees authorized to conduct qualifying exams for the degree of Doctor of Philosophy.

(b) During her tenure at the University of California, petitioner has performed valuable research and has published her findings in regard thereto concerning such subjects, to name a few, as, the cause and cure of air sickness, treatment for cyanide and carbon monoxide poisoning, the Crocker Tumor, human reaction to altitude, and studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential.

(c) During the tax years in question petitioner held the position of research associate in physiology. Her salary for 1952 was \$750.00 and for 1953, \$500.00. During the tax years in question petitioner's primary research activities concerned studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential.

(d) Petitioner's home is located in Berkeley, California. In order to adequately perform her research duties, it was necessary for her to travel to Europe for the greater part of 1952 and 1953. A summary of the expenses necessitated by and incidental to such a trip is contained in Exhibit B, attached hereto and incorporated herein.

(e) These research activities so performed by petitioner are necessary for the preservation and maintenance of petitioner's position in her field as a valuable performer of research and, more specifically, such research achievements are regarded by the University of California as a most important factor in relation to continued employment in a department.

(f) Also, during the taxable years in question herein, petitioner was a member of various professional associations. A list of the associations to which she belonged and the expenditures related thereto is contained in Exhibit B attached hereto and incorporated herein. Such expenditures were necessary for the preservation and maintenance

of her position as a valuable performer of research in the fields of biology, zoology and physiology.

(g) Also, during the taxable years in question, petitioner was required to replace certain items of laboratory equipment accidentally damaged by her while performing her research activities. The damage was not compensated for by insurance or otherwise. A list of the expenditures relating to such damage is contained in Exhibit B attached hereto and incorporated herein.

(h) All of the expenditures referred to above were directly related to petitioner's research activities and to her profession in general. All of such expenditures were necessary to preserve and maintain petitioner's position in her field of endeavor. The Commissioner has erroneously concluded that none of the expenditures are deductible.

Wherefore, the petitioner prays that this Court may hear the proceeding, find that there is no deficiency in income tax due from petitioner, as determined by the said Commissioner, and for such other or further relief as the Court shall find meet or proper.

/s/ FRANKLIN C. STARK,
STARK & CHAMPLIN,

Counsel for Petitioner.

Duly Verified.

EXHIBIT "A"

Form 1230 (App.)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner

Appellate Division—San Francisco Region
Room 1010—870 Market Street
San Francisco 2, California

May 22, 1956

In Replying Refer to Ap:SF:AA:JEH 90-D:
HCM.

Dr. Matilda M. Brooks
630 Woodmont Avenue
Berkeley 8, California

Dear Dr. Brooks:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1952 and December 31, 1953 discloses a deficiency or deficiencies of \$982.80 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you

Exhibit "A"—(Continued)

may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Rm. 1010, 870 Market St., San Francisco 2, California. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

RUSSELL C. HARRINGTON,
Commissioner,

/s/ By **LOUIS BRAUNAGIL,**
Special Assistant,
Appellate Division.

Enclosures:

Statement

Agreement Form

IRS No. 160

Exhibit "A"—(Continued)

Ap:SF:AA:JEH

90-D:HCM

STATEMENT

Dr. Matilda M. Brooks
630 Woodmont Avenue
Berkeley 8, California

Tax Liability for the Taxable Years Ended December 31, 1952
and December 31, 1953

Year	Deficiency
1952 Income Tax	\$473.10
1953 Income Tax	509.70
Totals	<u>\$982.80</u>

In making this determination of your income tax liability, careful consideration has been given to your protest dated February 20, 1956 and to the statements made at the conferences held on March 8, 1956 and April 12, 1956.

Adjustments to Income

Year: 1952

Net income as disclosed by return	\$1,366.45
Unallowable deductions and additional income:	
(a) Miscellaneous expense	3,025.59
Total	<u>\$4,392.04</u>
Nontaxable income and additional deductions:	
(b) Contributions	982.11
Net income as adjusted	<u>\$3,409.93</u>

Explanation of Adjustments

(a) Deductions claimed for travel and other expenses in connection with research activities in the following amounts:

	Year 1952	Year 1953
Professional organizations	\$ 26.00	\$ 39.00
Laboratory expenses	11.59	15.00
Travel expenses	2,988.00	3,685.20
Total	<u>\$3,025.59</u>	<u>\$3,739.20</u>

Exhibit "A"—(Continued)

are determined to be not allowable as ordinary and necessary expenses incurred in carrying on a trade or business, but are allowed as contributions to the extent permitted by law each year.

(b) The deduction for contributions is increased by \$982.11 as shown below:

Contributions shown on return	\$ 68.00
Research expenses disallowed in (a) above	3,025.59
	<hr/>
Total contributions	\$3,093.59
	<hr/>
Adjusted gross income shown on return	\$5,801.69
Less: Property taxes*	(551.14)
	<hr/>
Adjusted gross income as corrected	\$5,250.55
Maximum contribution allowable—20% of adjusted gross income	\$1,050.11
Contributions claimed on the return	68.00
	<hr/>
Additional contributions allowable	\$ 982.11

*Property taxes applicable to rental property are transferred from itemized deductions to deductions allowable in computing adjusted gross income.

Computation of Income Tax

Year: 1952

Net income	\$3,409.93
Less: 1 Exemption	600.00
	<hr/>
Income subject to tax	\$2,809.93
Combined normal tax and surtax	\$ 643.24
Income tax liability	\$ 643.24
Income tax reported on return	
Original Account No. OF 118754	
First California District	170.14
	<hr/>
Deficiency in income tax	\$ 473.10

Exhibit "A"—(Continued)

Adjustments to Income

Year: 1953

Net income as disclosed by return	\$ (97.25)
Unallowable deductions and additional income:	
(a) Miscellaneous deductions	3,739.20
Total	\$3,641.95
Nontaxable income and additional deductions:	
(b) Contributions	774.87
Net income as adjusted	\$2,867.08

Explanation of Adjustments

(a) Miscellaneous deductions are disallowed in the amount of \$3,739.20 as explained in item (a) of Explanation of Adjustments for the year 1952.

(b) The deduction for contributions is increased by \$774.87 as shown below:

Contributions shown by return	\$ 68.00
Research expenses disallowed in item (a) above	3,739.20
Total contributions	\$3,807.20
Adjusted gross income shown on return	\$4,774.16
Less: Property taxes*	559.83
Adjusted gross income as corrected	\$4,214.33
Maximum contribution deduction allowable	
20% of adjusted gross income	\$ 842.87
Contributions claimed on the return	68.00
Additional contributions allowable	\$ 774.87

* Property taxes applicable to rental property are transferred from itemized deductions to deductions in computing adjusted gross income.

Computation of Income Tax

Year: 1953

Net income	\$2,867.08
Less: 1 Exemption	600.00
Income subject to tax	\$2,267.08

Exhibit "A"—(Continued)

Combined normal tax and surtax	\$ 509.70
Income tax liability	\$ 509.70
Income tax reported on return	
Original Account No. OR 663544	
First California District	None
Deficiency in income tax	\$ 509.70

EXHIBIT "B"

Disputed Expenditures For 1952

A—Professional Organizations:

Marine Biology Association	\$ 6.00
Cooper Conservation	4.00
American Physiological Society	8.00
Society of Experimental Biology and Medicine	8.00
	<hr/>
	\$ 26.00

B—Laboratory Expenses:

Glass Breakage	10.00
Batteries	1.59
	<hr/>
	\$ 11.59

C—Expenses for travel away from home:

Train, Berkeley to New York, plus Pullman	\$ 180.00
Ship, New York to Naples, Italy	438.00
Passport	10.00
Baggage	20.00
Porters	15.00
Taxis	15.00

Exhibit "B"—(Continued)

Tips on ship	30.00
Meals and lodgings and miscellaneous transportation expenses while in Europe at \$10.00 per diem from May 17, 1952 to December 31, 1952 (228 days)	2,280.00
	<hr/>
	\$2,988.00
	<hr/> <hr/>

Disputed Expenditures For 1953

A—Professional Organizations:

Marine Biological Laboratory	\$ 6.00
Cooper Conservation	4.00
Bermuda Laboratory	2.00
American Physiological Society	8.00
Society of Experimental Biology and Medicine	8.50
University of Pittsburg	3.00
Western Naturalists	2.00
Society of General Physiology	2.00
Phi Beta Kappa	1.00
Sigma Xi	3.00
	<hr/>
	\$ 39.00
	<hr/> <hr/>

B—Laboratory Expenses:\$ 15.00

C—Expenses for travel away from home:

Ship, England to New York	\$ 285.00
Baggage	25.00
Porters	25.00

Exhibit "B"—(Continued)

Taxis	10.00
Tips on ship	25.00
Ship, Naples, Italy, to Turkey and return—to attend medical conference	375.20
Train, Naples to London	80.00
Train, London to Southampton	10.00
Naples to Lab. at Banyuls, research lab. at Sorbonne in Paris and return to Naples	120.00
Meals and lodgings and miscellaneous transportation expenses while in Eu- rope at \$10.00 per diem from Janu- ary 1, 1953 to October 1, 1953 (273 days)	2,730.00
	<hr/>
	\$3,685.20
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EXHIBIT "C"

Know All Men By These Presents:

That Matilda M. Brooks does by these presents make, constitute and appoint Thomas E. Gay her true and lawful attorney to verify or otherwise execute in her behalf any and all petitions or other pleadings to be filed with the Tax Court of the United States in connection with income tax matter relating to her for the years of 1952, 1953 and any and all years whatsoever, giving and granting unto said attorney full power to do everything requisite and necessary to be done in the premises, as fully as the undersigned might do if personally present,

Exhibit "C"—(Continued)

with full power of substitution or revocation at any time subsequent to the date hereof and prior to the revocation hereof.

The undersigned does hereby further revoke any power of attorney heretofore given or made by her with respect to the above entitled matter.

In witness whereof, the undersigned has caused her name to be signed this .. day of August, 1956.

MATILDA M. BROOKS.

Served and Entered August 27, 1956.

[Endorsed]: T.C.U.S. Filed August 20, 1956.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner admits and denies as follows:

1, 2, 3. Admits the allegations in paragraphs 1, 2 and 3.

4(a), (b), (c). Denies the allegations of error in subparagraphs (a), (b) and (c) of paragraph 4.

5(a). Admits that petitioner is a scientist and holds the degree of Doctor of Philosophy. Admits that during the period of her association with the

University of California, her primary position has been as a research associate in the fields of biology, zoology and physiology. Denies the remaining allegations in subparagraph (a) of paragraph 5.

(b). Admits the allegations in subparagraph (b) of paragraph 5.

(c). Admits that during the tax years in question petitioner's primary research activities concerned studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential. Denies the remaining allegations in subparagraph (c) of paragraph 5.

5(d). Admits petitioner's home is located in Berkeley, California. Admits that in order to adequately perform her research duties, it was necessary for her to travel to Europe for the greater part of 1952 and 1953. Denies the remaining allegations in subparagraph (d) of paragraph 5.

(e). Denies the allegations in subparagraph (e) of paragraph 5.

(f). Admits that during the taxable years in question herein, petitioner was a member of various professional associations. Admits that a list of the associations to which she belonged and the expenditures related thereto is contained in Exhibit B attached to the petition. Denies the remaining allegations in subparagraph (f) of paragraph 5.

(g). Admits the allegations in subparagraph (g) of paragraph 5.

(h). Denies the allegations in subparagraph (h) of paragraph 5.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue
Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
T. M. Mather, Assistant Regional Counsel, Ed-
ward H. Boyle, Special Attorney, Internal
Revenue Service.

Served and Entered September 20, 1956.

[Endorsed]: T.C.U.S. Filed September 17, 1956.

[Title of Tax Court and Cause.]

AMENDMENT TO ANSWER

Respondent, pursuant to leave granted by the Court, amends his answer hereto filed as follows:

7. Further answering, respondent alleges:

A. That during the year 1952 petitioner received the sum of \$1,000 from the University of California to cover her tax deficiencies for 1947 and 1948 arising from the disallowance of expenditures for research.

B. That petitioner did not include the said

\$1,000 in her income tax return for 1952 or any other year.

C. That the notice of deficiency mailed to petitioner on May 22, 1956, and attached to the petition herein, does not take into account the said \$1,000.

D. That the said \$1,000 constitutes taxable income in the year 1952.

Wherefore, it is prayed that the Court redetermine the deficiencies herein to be the amounts determined by the Commissioner in the notice of deficiency plus an increased deficiency in income tax for the year 1952 in the amount of \$669.90, claim for which is hereby made.

/s/ NELSON P. ROSE,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
Edward H. Boyle, Attorney, Internal Revenue
Service.

Served January 23, 1958.

[Endorsed]: T.C.U.S. Filed January 23, 1958.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated that the following facts may be taken as true by the Court with the reservation that this stipulation shall be without prejudice

to the right of either party to introduce further evidence not contrary to the facts herein stipulated:

1. Matilda M. Brooks, hereinafter referred to as petitioner, is an individual with place of residence at 630 Woodmont Avenue, Berkeley, California. The returns for the period here involved were filed with the Director of Internal Revenue for the First District of California in San Francisco, California.

2. Petitioner is a scientist and received a Ph.D. from Radcliffe College in 1920. For six years thereafter she worked in the Hygiene Laboratory of the United States Public Health Service, four of those years as an Assistant Biologist and the last two years as an Associate Biologist. While with the Public Health Service and thereafter, but in connection with her research activities while therewith, petitioner published results of her research activities in the following publications, among others: Public Health Reports, Vol. 38, No. 26, p. 1449; Vol. 38, No. 26, p. 1470; Vol. 38, No. 36, p. 2074 (1923); Vol. 38, No. 50, p. 2951; Vol. 40, No. 4, p. 139 (1925); Carnegie Institute of Washington Year Book, No. 22, 1923, p. 158; Protoplasm, Special Report, Vol. 1, Paper No. 3, p. 305; and American Journal of Physiology, Vol. 76, No. 2, p. 360 (1926).

3. In 1927, petitioner's husband, Dr. Sumner C. Brooks, also a scientist, came to the University of California as a Professor of Zoology, which position he held with the university until his death in

1948. At the time of his appointment as a Professor of Zoology, Dr. Sumner C. Brooks received a letter dated June 1, 1927, from Dr. C. A. Kofoed, Chairman of the Department of Zoology of the University of California, wherein Dr. Kofoed stated: "I hope you can convince Mrs. Brooks that she would have full opportunity here for research. The facilities of the laboratory in so far as they are at our disposal would always be available for her."

4. Petitioner left the Public Health Service in 1926, and in 1927 accompanied her husband to the University of California and was at that time given an appointment on the Berkeley Campus as Research Associate in Biology, without compensation, and petitioner served the university in that capacity until 1949 except for two intervals, one from October 17, 1934 to December 16, 1934, and the other from October 24, 1936 to June 30, 1937. During these intervals, her husband was on leave of absence without salary and she carried on his work, under an appointment as Lecturer in Zoology, receiving the salary released by his leave, the amount of which salary was as follows: for 1934, \$5,880.00; for 1936-1937, \$3,472.00.

5. In 1949 petitioner was appointed Research Associate in Physiology, without compensation, which appointment she has continuously held since 1949, except as to the "without compensation" aspect thereof, which aspect was modified in 1952 by the university. Attached hereto and incorporated herein by reference in chronological order are the

following joint exhibits, which exhibits, among others, relate to the status of petitioner at the university and the characterization of disbursements made to her during 1952 and 1953 and subsequent years:

Exhibit 1-A, Staff Record of the University of California, Berkeley, California, showing appointments of and payments made to petitioner from September 6, 1927, through and including date of this stipulation.

Exhibit 2-B, Extracts from General Employment Regulations of the University of California, showing the university's policy regarding employment of near relatives in the same department or division.

Exhibit 3-C, Letter of Robert G. Sproul, President of the University of California, dated January 19, 1952, showing portions of Personnel Rules, Qualifications and Salary Scales Governing the Appointment of Non-Faculty Professional Research Personnel.

Exhibit 4-D, Extracts from January 31, 1952 minutes of Committee on Finance and Business Management.

Exhibit 5-E, President Sproul's report of March 5, 1952, to the Committee on Finance and Business Management.

Exhibit 6-F, Extracts from March 13, 1952 minutes of Committee on Finance and Business Management.

Exhibit 7-G, Extracts from April 10, 1952 minutes of aforesaid committee.

Exhibit 8-H, Letter of O. Lundberg, Controller of the University of California, dated May 6, 1952, to President Sproul.

Exhibit 9-I, Extracts from May 23, 1952 minutes of aforesaid committee.

Exhibit 10-J, Extracts from June 19, 1952 minutes of aforesaid committee.

Exhibit 11-K, Extracts from October 1, 1953 minutes of aforesaid committee.

Exhibit 12-L, Containing in reverse chronological order official university documents leading up to and evidencing petitioner's appointment "with salary" at the rate of \$500.00 per annum for the period July 1, 1951 to June 30, 1952. In this regard it is further agreed that the official university documents leading up to and evidencing petitioner's appointment "with salary" at the rate of \$500.00 per annum for the periods July 1, 1952 to June 30, 1953; July 1, 1953 to June 30, 1954; etc., to date of present appointment which terminates on June 30, 1958, are similar in sequence to those official documents contained in Exhibit 12-L and contain the same written matter contained therein except as to dates and the constitutional oath of office.

6. It is agreed that in addition to the data shown in Exhibits 1-A, 10-J, 11-K and 12-L with regard to some or all of the years 1952 through 1956, the

Records of Earnings of the university, which records are kept by the university for the purpose of preparing W-2 statements, among other things, show the following W-2 information:

Year	Total Wages	Tax Withheld
1952	\$749.96	\$49.98
1953	\$499.92	\$99.96
1954	\$499.92	\$90.00
1955	\$499.92	\$90.00
1956	\$499.92	\$90.00

7. In addition to the sum of \$749.96 received by petitioner from the university in 1952, as set forth in paragraph 6 above, petitioner received the lump sum of \$1,000 from the university, which disbursement was made pursuant to the budget transfer recommended in Exhibit 9-I attached hereto.

8. Petitioner's name is listed in American Men of Science, and is mentioned in the Eighth Edition of that volume, published in 1949, for her contributions to research in the fields of respiration, antagonism of salts, effects of arsenic on cells, permeability of cells, and oxidation reduction.

/s/ HERBERT P. MOORE, JR.,

Counsel for Petitioner.

/s/ NELSON P. ROSE,

Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed January 23, 1958.

30 T. C. No. 115

Tax Court of the United States

Docket No. 63936. Filed August 18, 1958

Matilda M. Brooks, Petitioner, vs. Commissioner
of Internal Revenue, Respondent.

FINDINGS OF FACT AND OPINION

Deductions—Travel and Other Expenses.—Taxpayer was a scientist engaged in research. She was appointed a Research Associate in Physiology, without compensation, by the University of California in 1949. For the periods July 1, 1951 to June 30, 1952 and July 1, 1952 to June 30, 1953 she was appointed a Research Associate, with salary of \$500 per annum. She also was paid \$1,000 by the university in 1952 to help her meet deficiencies in income tax for former years. By answer the Commissioner claimed the \$1,000 as taxable income. In 1952 and 1953 taxpayer went to Europe. On these trips she spent \$2,988 and \$3,685.20 for expenses incidental to her research. She was not studying for a higher degree or a new profession. The university did not require taxpayer to travel in connection with her research. Held, on the facts, the Commissioner properly disallowed the travel expenses. Held, further, the \$1,000 paid in 1952 was not taxable income.

Herbert P. Moore, Jr., Esq., for the petitioner.

Edward H. Boyle, Esq., for the respondent.

Tietjens, Judge: The Commissioner determined deficiencies in income tax of \$473.10 and \$509.70 for the years 1952 and 1953, respectively, and an increased deficiency of \$669.90 for 1952 in an amended answer.

The questions for decision are (1) whether certain claimed deductions for travel and other expenses in connection with research activities were properly disallowed, and (2) whether a \$1,000 payment received by petitioner from the University of California in 1952 was taxable as income.

Findings of Fact

The stipulated facts are so found and are incorporated herein by reference.

Petitioner lives in Berkeley, California. Her income tax returns for 1952 and 1953 were filed with the director of internal revenue for the first district of California in San Francisco, California.

At the time of the trial of this case petitioner was in her sixth decade. She is a scientist and received a Ph.D. degree from Radcliffe College in 1920. For six years thereafter she worked in the Hygiene Laboratory of the United States Public Health Service, four of those years as an Assistant Biologist and the last two years as an Associate Biologist. In connection with her research activities while with the Public Health Service and thereafter petitioner published the results in a number of publications.

In 1927 petitioner's husband, Dr. Sumner C.

Brooks, also a scientist, came to the University of California as a Professor of Zoology, which position he held until his death in 1948. At the time of his appointment as a Professor of Zoology, Sumner received a letter dated June 1, 1927, from Dr. C. A. Kofoed, Chairman of the Department of Zoology of the University of California, wherein Dr. Kofoed stated: "I hope you can convince Mrs. Brooks that she would have very full opportunity here for research. The facilities of the laboratory, in so far as they are at our disposal, would always be available for her."

Petitioner left the Public Health Service in 1926, and in 1927 accompanied her husband to the University of California where she was given an appointment as Research Associate in Biology, without compensation. Petitioner served the university in that capacity until 1949 except for two intervals, one from October 17, 1934 to December 16, 1934, and the other from October 24, 1936 to June 30, 1937. During these intervals, her husband was on leave of absence without salary and she carried on his work, under an appointment as Lecturer in Zoology, receiving the salary released by his leave as follows: for 1934, \$5,880; for 1936-1937, \$3,472.

In 1949 petitioner was appointed Research Associate in Physiology, without compensation. The "without compensation" aspect of the appointment was modified in 1952, as hereafter described.

During her connection with the University of California, petitioner performed valuable and im-

portant research and published her findings in regard thereto in many important scientific journals concerning such subjects, among others, as the cause and cure of air sickness, treatment for cyanide and carbon monoxide poisoning, the Crocker Tumor, human reaction to altitude, and studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential. Also, her scientific work has been recognized by her election to membership in such scholarly organizations as the Physiological Society; Phi Beta Kappa; Sigma Xi; listing of her name in American Men of Science; and radio dramatization of her work on March of Time and Ceilings Unlimited.

During the taxable years petitioner's primary research activities concerned studies on growth and development of normal and abnormal forms in single cells as affected by changes in redox potential. Certain single cells which she studied grow only in certain parts of the world and, in order to perform her research, she traveled in Europe during the greater part of 1952 and 1953. She expended \$2,988 in 1952 and \$3,685.20 in 1953 for her travel expenses to and from Europe, all of which expenses were incidental to her performance of research there.

Until the year 1952 the only sums of money received by petitioner from the university were in the form of research grants. In 1952 the university paid petitioner the gross amount of \$1,749.96 and in 1953 the gross amount of \$499.92. Minutes of

various meetings of the Regents of the University of California and various other official documents show the following information concerning such payments:

(a) Petitioner traveled to Peru in 1947 and 1948, in connection with which she claimed deductions for travel expenses in those years. These deductions were thereafter questioned by the Commissioner. She claimed the expenses were required by her research activities and that the expenses were legitimate business deductions. She had many discussions with representatives of the Commissioner from time to time concerning her 1947-1948 returns. The dispute was still unsolved in January of 1952, at which time she brought her tax problems to the attention of the Regents of the University at a January meeting, suggesting to them that her designation as an "employee", even though without salary, rather than a "research assistant", would aid her tax status. The Regents realized the impracticality of this suggestion, and indicated at their second meeting, after receiving the President's report on petitioner's services to the university and her record as a scientist, that they were inclined to reimburse petitioner for her possible income tax deficiencies.

(b) At a third meeting, held April 10, 1952, the Regents voted in favor of reimbursing petitioner in an amount not to exceed \$1,000 of her aggregate 1947-1948 proposed deficiencies, and requested the President to ascertain the exact amount thereof. In a letter dated May 6, 1952, the uni-

versity Controller recommended to the President that \$1,000 be allowed to petitioner based on estimated total possible deficiencies of \$850 to \$900 for 1947-1948, and possible additional deficiencies for other past years, and in addition recommended petitioner's appointment, effective July 1, 1951, with an "annual stipend" of \$500, until severance of her connection with the university, predicated on the assumption that petitioner's work was valuable to the university.

(c) At the meeting of May 23, 1952, the following budget transfer was made, without further comment, by the Regents:

(1) From the Regents' Emergency Fund to:

(a) Miscellaneous Expense: Supplies and Expense \$1,000.00 to cover tax deficiency disallowances on the 1947 and 1948 Federal Income Tax return of Dr. Matilda M. Brooks in accordance with the April 10, 1952 minutes * * *

On May 13, 1952, a request to issue a check to petitioner for \$1,000 "to cover deficiency disallowances on 1947 and 1948 Federal Income Tax Returns" was approved by the President, and on June 16, 1952, a check in that amount was issued to petitioner.

(d) At the meeting of June 19, 1952, the following budget transfer was made, without further comment, by the Regents:

(14) From * * * Searles Fund, to:

(a) School of Medicine: Physiology: Searles Fund: \$500.00 Salaries. To provide a stipend for

Dr. Matilda M. Brooks to cover tax deficiency, disallowances of expenditures for research, on Federal Income Tax returns for 1951-52. [Emphasis supplied.]

And, at an October meeting the following budget transfer was made:

(5) From * * * Searles Fund to:

(a) School of Medicine: Physiology: Searles Fund: \$500.00 Academic Salaries. To provide stipend * * * covering tax deficiency, disallowances of expenditures for research, on Federal Income Tax returns for 1952-53. [Emphasis supplied.]

(e) Pursuant to aforesaid budget transfers, petitioner was appointed Research Associate "with salary" at the rate of \$500 per annum for the period July 1, 1951 to June 30, 1952, and the period July 1, 1952 to June 30, 1953, which appointments provided, inter alia:

Salary is subject to such deductions as may be required pursuant to applicable laws or regulations.

In the event that my service does not continue throughout the year, the salary due me will be based upon the period of actual service, and I will return to the University such part of my salary as is not actually earned on this basis.

Similarly worded appointments at the same salary rate were made for July 1, 1953 to June 30, 1954, and all subsequent academic years, and the Records of Earnings of the University show the following W-2 information concerning petitioner:

Year	Total Wages	Tax Withheld
1952	\$749.96	\$49.98
1953	499.92	99.96
1954	499.92	90.00
1955	499.92	90.00
1956	499.92	90.00

During the years of her association with the university, petitioner received research support from other sources, such as the National Academy of Sciences; the American Academy of Arts and Sciences; the National Research Council; the University of California; the American Philosophical Society; the Ella Sachs Plotz Research Fund; and the Kappa Alpha Theta Fraternity. Generally, the funds provided by these monetary research grants were expended on supplies, equipment, laboratory fees, salaries of laboratory assistants, and travel and living expenses, one of which travel and living expense grants provided for a trip to the South Seas to study cells found there. The monetary value of these various grants generally ranged from \$300 to \$900, with the exception of the travel and living expense grants and the Kappa Alpha Theta grant, which was in the amount of \$6,000. As the recipient of these monetary grants, petitioner had control of the research performed and the application of the funds, so long as the funds were applied on the particular research project. However, except to the extent that such grants provided for living expenses, petitioner received no direct economic benefit therefrom.

Except when she was working for the Public Health Service, except to the extent that research grants paid her living expenses, except to the extent that she received the benefit of her husband's salary from the university, except when she was substituting for her husband and earning his salary, and taking into account the \$500 per annum stipend paid by the university, petitioner has made no net profit from her scientific activities. Because her husband's earnings provided a living for the two of them and because her research grants minimized her expenditures for research until her husband's death in 1948, petitioner did not have a strong independent profit motive in regard to her research activities.

During the taxable years petitioner received and asked for no fellowships, grants or salaries from any of these organizations. She was not studying for a higher degree or a new profession. She was continuing research of the same character with which she was occupied in former years. The university did not require her to travel during the taxable years. In those years she was not in the business or profession of seeking grants or fellowships. Neither was she engaged on her own account in the profession of performing scientific research for profit. She was, however, an employee of the university at an annual stipend of \$500.

Petitioner's travel expenses in 1952 and 1953 were not ordinary and necessary expenses either in carrying on a trade or business or made in con-

nection with her employment in the performance of services as an employee of the university.

Expenses of \$33.59 in 1952 and \$47 in 1953 were incurred in connection with her employment as a Research Associate of the University of California and are deductible.

The \$1,000 paid her by the university in 1952 in order to reimburse her or pay for her income tax deficiencies in previous years has not been proved to be taxable income to petitioner.

Opinion

With respect to the travel expenses and certain small expenditures made for laboratory breakage and membership in professional societies, petitioner argues either that they were properly claimed as deductions for "ordinary and necessary expenses in carrying on a trade or business" or paid for the production of income, or, as necessary expenses paid in connection with her performance of services as an employee of the university.

The Commissioner has determined that the travel expenses are disallowable but he has also determined that some of the other claimed deductions are allowable as contributions to the university.

In deciding issues of this kind we recognize that the line to be drawn between personal expenses and business expenses is sometimes nebulous, and that that may be the case here. Nevertheless the sum and substance of the testimony and the documentary evidence is that petitioner for years has been a dedicated scientist carrying on scientific re-

search which produced important discoveries, without, however, producing any net income. But we do not think she has established that in conducting her research she was ever doing so as a "trade or business" or that she was performing her research for "profit". True, certain of her discoveries were new to science and her papers thereon merited publication in scientific journals, but so far as we can ascertain from the record they were not the result of a profit motive or of anything more than a "hope" that they might obtain for her, sometime in the future, a grant or a fellowship or a salary status. They resulted from her curiosity, her desire to benefit mankind in whatever way she could, her innate drive as a "pure scientist" to find out as much as she could about her chosen field, all commendable in the highest sense, but in our opinion, without favorable tax consequences to petitioner. In the taxable years she admitted that she was not in the "business of applying for scholarships or anything" but maintained that by continuing her research activities she would be in "position to be either reimbursed or paid taxable income for her research activities." She testified she never received money or anything else of monetary value as a result of her trips to Europe in 1952 or 1953. The university did not require or even suggest that she take those trips or incur the expenses which she did and there is nothing in the evidence to establish that the expenditures were ordinary and necessary in connection with maintaining her status as a Research Associate. After

her husband died she was hoping to "acquire some salary" because she was not certain that her own property together with what he left her would see her through. However, petitioner applied for no fellowships or grants in 1952 or 1953 and the only change in her salary status so far as the university is concerned came about as a result of her tax difficulties for previous years. The \$500 annual stipend which she was allowed in 1952 and thereafter had no direct connection with the travel expense deductions claimed here and the record is such that we must sustain the Commissioner's determination.

We do think, however, that the laboratory breakage expenses and the professional society fees are directly connected with her status as a Research Associate at a \$500 annual salary and that they are properly deductible.

With respect to the \$1,000 which was paid petitioner in a lump sum in 1952 we hold that the Commissioner has not shown this was taxable income. The issue was affirmatively raised in an amended answer and the Commissioner has the burden of proof. So far as the record shows, the amount was paid the petitioner to help her in meeting deficiencies in income tax for prior years. The university was under no obligation to make this payment. Petitioner never asked for this sum, did nothing to earn it, and though the evidence does not clearly establish it as a gift, the Commissioner was bound to prove it was taxable income. In our

opinion he has not done so and on this issue we hold for the petitioner.

Decision will be entered under Rule 50.

Served August 18, 1958.

Tax Court of the United States
Washington

Docket No. 63936

MATILDA M. BROOKS, Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed August 18, 1958, the parties having filed on September 23, 1958, an agreed computation of tax, now therefore, it is

Ordered and Decided: That there are deficiencies in income tax in the amounts of \$464.84 and \$498.14 for the taxable years 1952 and 1953, respectively.

[Seal] /s/ NORMAN O. TIETJENS,
 Judge.

Entered September 30, 1958.

Served October 2, 1958.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Matilda M. Brooks, the petitioner in this cause, by Herbert P. Moore, Jr., counsel, hereby files her petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States entered on September 30, 1958, 30 T.C. No. 115, Docket No. 63936, determining deficiencies in the petitioner's Federal income taxes for the calendar years 1952 and 1953, in the respective amounts of \$464.84 and \$498.14, and respectfully shows:

I.

Nature of the Controversy

Petitioner is an accomplished research scientist with the University of California, and in 1952 and 1953 it was necessary for her to travel to Europe to carry on her scientific work. She claimed travel expenses of \$2,988.00 for 1952 and \$3,685.20 for 1953 as ordinary and necessary business expenses on her 1952 and 1953 returns. She also claimed expenses for membership in professional associations of \$26.00 for 1952, and \$39.00 for 1953 as ordinary and necessary business expenses on her 1952 and 1953 returns.

The Commissioner disallowed these expenditures as ordinary and necessary business expenses, but did allow them as charitable contributions subject to the 20% limitation of § 23(o).

Petitioner also sustained casualty losses of \$11.59

for 1952 and \$15.00 for 1953, which were disallowed by the Commissioner, but which losses were admitted in the pleadings before the Tax Court.

Petitioner served the University of California as a scientist without salary prior to 1952, during which year she received \$749.96, which sum was denominated salary by the University. A similarly characterized payment of \$499.92 was made to petitioner in 1953. Also, petitioner received \$1,000.00 from the University in 1952, which sum was not denominated salary by the University and was considered to be a gift by petitioner. Respondent was not aware of this \$1,000.00 payment until shortly before trial of this matter, contended that it constituted taxable income, and upon motion, amended his answer accordingly.

The Tax Court of the United States sustained the Respondent's contentions regarding the travel expenses but found in petitioner's favor regarding the membership expenses, casualty losses and the \$1,000.00 gift.

II.

Court In Which Review Sought

Review of said decision of the Tax Court of the United States is hereby sought in the United States Court of Appeals for the Ninth Circuit pursuant to §§ 7481-7483 of the Internal Revenue Code.

III.

Allegations of Venue

Petitioner is an individual with place of residence at 630 Woodmont Avenue, Berkeley, Cali-

fornia. The returns for the period here involved were filed with the Director of Internal Revenue for the First District of California in San Francisco, California, which office is located in the Ninth Circuit.

IV.

Jurisdictions

The decision of The Tax Court of the United States was entered herein on September 30, 1958, and pursuant to § 7483 of the Internal Revenue Code, the time within which this petition may be filed expires three months after said date, namely, on December 29, 1958, if a 90-day period is used, or on December 30, 1958, if the actual months of October, November and December are used.

Wherefore, petitioner prays that the United States Court of Appeals for the Ninth Circuit review said decision of The Tax Court of the United States.

/s/ HERBERT P. MOORE, JR.,
STARK & CHAMPLIN,
Counsel for Petitioner.

Duly Verified.

[Endorsed]: T.C.U.S. Filed December 29, 1958.

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Arch M. Cantrall, Chief Counsel, Internal Revenue Service, Washington 25, D. C., and Melvin L. Sears, Regional Counsel, and Edward H. Boyle, Attorney, Internal Revenue Service, 10th Floor, Flood Building, San Francisco, California.

You Are Hereby Notified that petitioner, on December 26, 1958, mailed to, and pursuant to § 7502 of the Internal Revenue Code, thereby filed with the Clerk of the Tax Court of the United States at Washington, D. C., a Petition For Review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above entitled cause. A copy of the Petition For Review is hereto attached and served upon you.

Dated at Oakland, California, this 26th day of December, 1958.

Respectfully,

/s/ HERBERT P. MOORE, JR.,
STARK & CHAMPLIN,
Counsel for Petitioner.

Acknowledgment of Service and Affidavits of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed December 29, 1958.

[Title of Tax Court and Cause.]

STATEMENT OF POINTS

In accordance with Rule 75(d) of the Rules of Civil Procedure for the District Courts of the United States, now comes Matilda M. Brooks, by her attorney, Herbert P. Moore, Jr., and hereby asserts the following errors which she intends to urge on review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States in the above cause:

1. The Tax Court erred in failing to find that all of petitioner's 1952 expenses of \$2,988.00 for travel and all of her 1953 expenses of \$3,685.20 for travel constituted ordinary and necessary expenses paid during the respective taxable years in carrying on a trade or business.

2. In the alternative, the Tax Court erred in failing to find that all of petitioner's 1952 expenses of \$2,988.00 and 1953 expenses of \$3,685.20 were ordinary and necessary expenses of travel, meals and lodging while away from home, paid by petitioner in connection with her performance of services as an employee of the University of California.

3. In the alternative, the Tax Court erred in failing to find that a reasonable proportion of such expenditures were ordinary and necessary expenses paid by petitioner in connection with her performance of services as an employee, and that a reasonable proportion is not less than the amounts of

money received by petitioner in respect of taxable years from the University of California as compensation for professional services performed.

4. The Tax Court erred in failing to allow petitioner to offer evidence during the trial of the matter as to the amount of compensation earned by her husband, which amounts, we believe, should be credited to petitioner to the extent that petitioner aided her husband in his professional activities.

/s/ HERBERT P. MOORE, JR.,
STARK & CHAMPLIN,
Counsel for Petitioner.

Acknowledgment of Service and Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed January 19, 1959.

[Title of Tax Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON REVIEW

To: The Clerk of the Tax Court of the United States:

In accordance with Rule 29 of the United States Court of Appeals For the Ninth Circuit, please prepare, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit, originals of the following documents and records in the above entitled cause in connection with

the Petition For Review heretofore filed by Matilda M. Brooks prepared in accordance with the provisions of Rule 75 or Rule 76 of the Rules of Civil Procedure For The District Courts of the United States:

1. The docket entries of all proceedings before the Tax Court.

2. Pleadings before the Tax Court as follows:

(a) Petition

(b) Answer

(c) Amendment to Answer filed at trial of matter on January 23, 1958.

3. Findings of Fact and Opinion of the Tax Court.

4. The Decision of the Tax Court.

5. The Petition For Review and Notice of Filing Petition For Review.

6. Stipulation of Facts filed at trial of matter on January 23, 1958, together with all exhibits attached thereto and incorporated therein.

7. From the official transcript of the oral testimony, that testimony contained on pages 11 through 70.

8. All exhibits admitted into evidence except exhibits 15, N, and O.

9. This Designation of Contents of Record on Review.

10. Enclosed Statement of Points served herewith in accordance with Rule 75(d) of Rules of

Civil Procedure For the District Courts of the
United States.

/s/ HERBERT P. MOORE, JR.,
STARK & CHAMPLIN,
Counsel for Petitioner.

Acknowledgment of Service and Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed January 19, 1959.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 17, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designations", including Joint exhibits 1-A thru 12-L, attached to the Stipulation of Facts, Joint Exhibit 13-M, admitted in evidence, Petitioner's exhibits 14, 15 and 16, admitted in evidence, and Respondent's exhibits N and O, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United

States, at Washington, in the District of Columbia,
this 22nd day of January, 1959.

[Seal]

HOWARD P. LOCKE,
Clerk, Tax Court of the United
States.

The Tax Court of the United States

Docket No. 63936

MATILDA M. BROOKS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Customs Courtroom 421, U. S. Appraisers Building,
630 Sansome Street, San Francisco, California,
Thursday, January 23, 1958.

The above-entitled matter came on for hearing,
pursuant to Calendar Call, at 2:45 o'clock p.m.

Before: The Honorable Norman O. Tietjens.

Appearances: Herbert P. Moore, Jr., 801 Financial Center Building, Oakland, California, on behalf of the Petitioner. Edward H. Boyle, on behalf of the Respondent. [1]*

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Proceedings

The Clerk: Docket No. 63936, Matilda M. Brooks.

Counsel state their appearances, please.

Mr. Moore: Herbert P. Moore for Petitioner.

Mr. Boyle: Edward H. Boyle for the Respondent.

The Court: Mr. Moore, do you want to make an opening statement to explain the issues to me?

Mr. Moore: Are you going to make your motion now?

Mr. Boyle: No.

Mr. Moore: On your answer?

Mr. Boyle: No.

Mr. Moore: Oh, I see.

Opening Statement On Behalf of
The Petitioner
By Mr. Moore

Mr. Moore: Your Honor, the question in issue is the deductibility of certain travel expenses to Europe in the years 1952 and 1953, and also the deductibility as an ordinary and necessary business expense certain dues paid to professional societies during the years 1952 and 1953, the amounts as to the dues being roughly 22, 23 dollars in 1952 and \$23 in 1953; the travel expenditures in '52 being roughly \$3,000 and in '53 a little over \$3,000.

We have two basic theories of recovery in this action. The Petitioner—we will show the Petitioner has been associated with the University of California since 1927. [2]

She has been a research associate without salary until sometime during the year 1952, at which time she was paid \$500. The characterization of such \$500 payment is in dispute here; in other words, whether it is compensation or some other type of—represented by some other characteristic.

Our first theory is that during the years 1952 and 1953 she was a paid employee at the University of California and that she was a paid research associate, and that research was required of her due to her position at the University and that, therefore, her expenses in regard to research activities in Europe were ordinary and necessary expenses.

Our second and strongest point, we believe, is that her profession has been throughout her life that of a performer of research. She began with the public health service in the 20's—I should say we will show in the 20's—and received a salary for her activities as a performer of research while there. Thereafter she came with the University without salary with her husband; and from 1927 to 1948, at the time when her husband passed away, that she received no salary.

She received, however, various grants during that period to aid her in her research work—money grants. That is, direct receipt of money and also indirectly. We believe that she and her husband were, in effect, a team while he was living at the University of California, and that she aided her [3] husband in his work and that a portion of his earnings with the University as a professor of zoology are attributable to the research work

she did. In other words, the profit motive during that period.

We also wish to show that the relationship between the research she did while with the public health and the research she is doing now, that she is not trying to increase her position or change her status. She is doing the same type of work now essentially that she was doing back in 1920; the same area of research.

In addition, we wish to show that there is a valid profit motive in this case, even though she has not made a net profit from her activities to date.

We wish to show that fellowships and other financial remuneration are available and that she hopes and intends to profit from these various—the sources from which these grants—these grants and fellowships can be obtained.

We feel that this case is somewhat similar to the Vanderbilt Case that you recently decided. We hope you have read it very carefully.

That's the big picture which we intend to show.

The Court: It was \$30,000 or \$40,000 one of those years.

Mr. Moore: From the trust?

The Court: No. [4]

Mr. Moore: That was one of the earlier years—oh, from the book.

The Court: One of the later years, I think.

Mr. Moore: Yes; from the book.

The Court: From his mother's life story, I think.

Mr. Moore: And that is the general theory; in other words, as an employee and, in any event, as

a—that being her life work performing research and with the profit motive, even though she hasn't become extremely wealthy to date.

The Court: All right. Is that all? Is that your statement? I don't want to cut you short by any means.

Mr. Moore: Yes. That's the general statement, unless you would like more detail on it.

The Court: No.

Mr. Moore: That will be developed.

The Court: Mr. Boyle?

Opening Statement On Behalf of
The Respondent
By Mr. Boyle

Mr. Boyle: If your Honor please, because of the nature of these payments in the years before the Court, 1952 and 1953, I will give a little background here.

The Petitioner received a doctor's degree from Radcliffe in 1920. She was with the United States Public Health Service as a research person or associate until 1926. [5]

In 1927 her husband accepted a position as a professor of zoology at the University of California, and she accompanied him to California and was promised laboratory space and facilities at that time. The record shows that she was actually——

The Court: Does it show now or will show?

Mr. Boyle: It will show. It will show that she was appointed research associate in biology in 1927 without pay and that she held that position until

1949, never receiving pay, except in 1934. In 1937 she took her husband's place and lectured in zoology while he was on leave.

During that period she received the salary released by his leave.

In 1949, she was appointed research associate in physiology, still without pay. About that time she began having discussions with the internal revenue service on her 1947 and 1948 returns. She had taken a trip—apparently to Peru—and had claimed the expenses in connection with that trip as an ordinary and necessary business expense.

This discussion went on for some time, and it came to the attention of the regents of the University. So in the Spring of 1952 they discussed the matter at some length—and their minutes will be put into the record—in which they resolved to reimburse her for the amount of the deficiency that she was going to—that was asserted against [6] her for 1947 and 1948. Therefore, they paid her \$1,000 in June of 1952 to cover her tax deficiency for 1947 and 1948.

They also at that time decided to pay her an annual amount, because this was a continuing problem for her with the internal revenue service; and by that time the internal revenue was questioning the years 1949, 1950 and 1951. So they decided to pay her \$500 in each year. As the record will show, they called it a tax stipend to cover tax deficiencies and disallowance expenses for research.

Now, in 1952 and 1953 Petitioner spent most of her time in Europe, also doing research apparently.

When she came to file her returns for those two years—and those are the years before the Court—she did not include the \$1,000 that she had received for 1947 and 1948, but she did put in the amount of \$750 in 1952. That amount covered the last six months of 1951 and the full calendar year of 1952.

Then in filing her return for 1953, she included the amount of \$500. She claimed deductions in those years, as stated by Mr. Moore, of approximately \$3,000 in 1952 and \$3,700 in 1953, the great bulk of those expenditures resulting from her trip to Europe.

The internal revenue service has disallowed those amounts as business expenses but has conceded or granted them as gifts from the University under Section 23-O, except that there is a 20 per cent limitation in Section 23-O, so she does [7] not get the full benefit. But to the extent they could give it to her, they have given her a deduction for those expenditures.

Now, the position of the Respondent is that to be allowable in full, these amounts must come under Section 23(a)(1)(A) as expenses, ordinary and necessary expenses, in connection with a trade or business and that there is no other section, except the gift section, that is, a contribution section of 23-O, which we have used. There is no other section to enable her to take these deductions; and, consequently, the issue is whether Petitioner's activities as a research associate in the years 1952 and

1953 were conducted for profit or as a means of earning a livelihood.

And the Respondent's position is that, whether the record proves her to be an employee of the University or not an employee, that the answer is still the same: If she is deemed to be an employee, what she received in 1952 and 1953 was not for profit and the University did not require or request her to go to Europe. And if she is not deemed to be an employee, she is not in a business with a profit motive and, therefore, the expenditures are not deductible either.

The Court: Sounds like an interesting situation. Is there a stipulation of facts?

Mr. Moore: There is a partial one, your Honor, yes, [8] or we wouldn't be here.

Mr. Boyle: We request leave to file a stipulation of facts, to which are joint exhibits 1-A through 12-L.

The Court: The stipulation will be received and the pertinent exhibits made part of the record.

(Petitioner-Respondent Exhibits 1-A through 12-L were received in evidence.)

Mr. Boyle: I request permission to file as the joint exhibit next in order the record of the University pertaining to the disbursement of the \$1,000 in 1952. And this relates to Paragraph 7 of the stipulation of facts, and also to joint Exhibit 7-G, 8-H and 9-I. It is just a continuation and a supplement to the stipulation of facts in those joint exhibits.

Mr. Moore: That's all right, your Honor.

The Clerk: 13-M.

The Court: It will be received.

(Petitioner-Respondent Exhibit 13-M was received in evidence.)

Mr. Moore: That's both of those documents? Do you have them attached together?

Mr. Boyle: Yes, sir. It is a 2-page document attached together.

Mr. Moore: While we are at it, why don't we attach the W-2 to that 1952 return? [9]

Mr. Boyle: Well, we can't do that, Mr. Moore, because apparently it was not on the return as filed.

Mr. Moore: Oh, I see.

Mr. Boyle: If you want to put that in I have no objection.

Mr. Moore: Why don't we put it in?

The Court: Let's take these things one at a time now.

Mr. Moore: Fine. We will just start out.

Mr. Boyle: I offer in evidence as Respondent's first in order Petitioner's federal income tax return for 1952.

The Court: There is no objection to this, Mr. Moore, is there?

Mr. Moore: No.

The Court: Admitted.

The Clerk: Respondent's Exhibit N.

(Respondent's Exhibit N was received in evidence.)

Mr. Boyle: And the Petitioner's federal income tax return for 1953.

The Court: Admitted.

The Clerk: Respondent's Exhibit O.

(Respondent's Exhibit O was received in evidence.) [10]

Mr. Moore: Do you have any other preliminary matters?

Mr. Boyle: No.

Mr. Moore: I call my first witness.

Dr. Brooks, will you please take the stand.

Whereupon

MATILDA M. BROOKS

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: Would you be seated and state your name and your address, please?

The Court: Please try to speak as distinctly as you can so that all of us can hear you, please.

The Clerk: Your name?

The Witness: Matilda M. Brooks, 630 Woodmont Avenue, Berkeley, California.

Direct Examination

Q. (By Mr. Moore): Dr. Brooks, try to speak loud enough so I can hear.

The Court: All of us would like to hear.

Q. (By Mr. Moore): First we are going to—as Mr. Boyle stated, you were with the public health service from 1920 to 1926? A. That's right.

Q. In 1920 you received your Ph.D. from Radcliffe [11] College, even though your actual work was done at Harvard University?

(Testimony of Matilda M. Brooks.)

A. That's right.

Q. You were a research assistant biologist for the first four years? A. Yes.

Q. And your salary at that time?

A. It was about 2800.

Q. Dollars. And the last two years you were an associate biologist? A. 3500.

Q. That was your—— A. 3500.

Q. ——yearly salary.

Now, while you were with the public health service, will you tell the Court in as few words as possible some of the research activities that you carried on?

A. While I was with the public health service I was working on two problems: One, the penetration of various salts, like the sodium chloride and potassium chloride, into single cells.

Is that loud enough?

Q. Yes; for me it is.

A. The other problem was the effect of changing the oxidation reduction potential of single cells on the [12] penetration of the various indicators which show whether or not the potential of the cell was in the positive or in the negative range.

Mr. Moore: Perhaps, your Honor, if you have any questions in regard to the scientific matter, I wish you would feel free to break in and ask.

The Court: I shall.

The Witness: I will go into detail.

Mr. Moore: I can't tell how far to go.

(Testimony of Matilda M. Brooks.)

The Court: I don't know that the detail is so necessary.

Q. (By Mr. Moore): And while you were with the public health service where did you travel, if anyplace?

A. Well, they sent me, oh, various places. In '22 I was sent down to Miami Beach where a certain single cell grows, a large unicellular organism about that size. And I was there for eight months working with—on those cells, which were collected in cooperation with the Carnegie Institute, who had a collector there and a ship. And I stayed at the beach for eight months.

In '26 I was sent—in '24 I was sent to Bermuda to work on a different kind of cell, and I was there for a year, and I had my salary and all my expenses paid by the United States Government—in the same type of work that [13] I am doing now.

Q. What type of work did you do in Bermuda?

A. Oxidation reduction potential on living cells and changes in the potential as affected by the penetration of these indicators and dyes into the single cells.

Q. You worked on the same type of cell in Miami as you did in Bermuda? A. Yes.

Q. But there was a distinction between—

A. There were different kinds of cells. The Miami cell was a large one and the Bermuda cell was a smaller one. But in order to make these laws, these fundamental laws general, you can't just

(Testimony of Matilda M. Brooks.)

use one organism; you have to use different organisms, and there were two different types. The one at Miami Beach was called the *valonia ventricosa* and the one in Bermuda the *valonia macrophysa*, which is a smaller one.

Q. The public health department sent you down there? A. Yes.

Q. Was it their decision that you should go down?

A. Oh, yes; oh, yes, of course, because I couldn't do the work otherwise. You see, in order to do the kind of work I am doing, you have to use the animals and the organisms which are at different parts of the world. You can't use just one thing and say, "Well, this is it." [14]

Q. I see. You must sample the various——

A. Yes, that's right.

Q. Now, at the time during which you were working with the public health department, you were married? A. That's right.

Q. And you were married to——

A. My husband was the biologist and I was the first assistant biologist, and then the associate biologist.

Q. He was the biologist?

A. The same department; that's right.

Q. And as the stipulation shows, and Mr. Boyle stated, you left the public health department in 1926? A. That's right.

Q. And in 1927 you accompanied your hus-

(Testimony of Matilda M. Brooks.)

band to the University of California where he was appointed a full professor?

A. Professor of zoology; that's right.

The Court: Now, Mr. Moore, may I interrupt a moment? Much of this material and these facts are in the stipulation.

Mr. Moore: Just that sentence just to give continuity to the evidence.

The Court: All right.

Q. (By Mr. Moore): Now, could you tell the Court why both of you went [15] to the University of California?

A. Well, you see, I was up against the same thing as wives are usually up against. You either stay with your husband or you don't stay with your husband, and I preferred to stay with my husband because they told me at that time at the University that I would always have every opportunity to do anything I wanted to. They would give me space and they would always have the facilities for me to work there.

But inasmuch as they had a rule there called the anti-nepotism rule, which forbids two members of one family to have a position in the same department, I was not definitely paid a salary; and that was why that was without salary.

Mr. Moore: That rule is in the stipulation.

Also I would like at this time to—well, I will wait for a few minutes while you are reading that.

I would like to offer in evidence as my Exhibit

(Testimony of Matilda M. Brooks.)

The Court: Well, what is it, please? Can you identify it, Mr. Moore?

Mr. Moore: Yes. It is a letter from Dr. C. A. Kofoid, the head of the Department of Zoology of the University of California, dated June 1, 1927.

The Court: Addressed to whom?

Mr. Moore: Addressed to Professor S. C. Brooks at Rutgers College. [16]

Mr. Boyle: This letter is referred to in Paragraph 3 of the stipulation of facts.

Mr. Moore: A portion of it.

The Court: I take it there is no objection?

Mr. Boyle: No objection.

The Court: Admitted.

The Clerk: Petitioner's Exhibit No. 14 was received in evidence.

Q. (By Mr. Moore): You have read this letter?

A. Oh, yes.

Q. Are there any other indications from the university as to their attitude of your coming to the university with your husband?

A. Oh, well, at that time it was generally talked around that the university was getting two scientists for the price of one. That was one of the things which they said; and also the fact that I was there not only helping my husband and working with him, but when he was ill I took over his work.

Q. To what extent did you aid your husband in

(Testimony of Matilda M. Brooks.)

his activities at the university, in his research and teaching activities?

A. I did a lot of his research for him, of course. And, as I say, when he was ill I took complete charge of the [17] lectures and the laboratory courses.

When he was invited by the Farraday Society in London to give one of his papers there, I wrote up the paper and took it over because they wanted me to give it if he couldn't come. It was the time when he was very ill. So I went to London and took his Farraday Society paper and read it before the Farraday Society, which is—I suppose you all know what that is. It is a very learned society of chemists, physicists and biologists in the University of London.

Q. And also did you go on a trip with him in '40 and, if so——

A. In 1943, '44. Well, in 1943-'44 we were sent by the State Department of the U. S. Government on a trip around South America, giving—under the auspices of the coordinator of intra-American affairs, giving lectures in every country in South America for about 8 months.

Q. And did you give any lectures at that time?

A. Oh, yes; Peru and Argentina and Chile.

Q. Did you aid him at all in his lectures?

A. You mean when he gave his lectures?

Q. Yes.

A. Not necessarily, because he gave his own lectures.

(Testimony of Matilda M. Brooks.)

Q. I see. You also performed experiments and things like that for him throughout—— [18]

A. Oh, yes.

Q. By the way——

A. Especially when the radioactive material first came in. He was ill and so I did all that work on the penetration of radioactive potassium chloride into living cells.

Q. By the way, what was his general area of research activity?

A. Well, his—the subject of his work was permeability of living cells, which means the penetration of substances into the interior. You see, in biology it is difficult to find out whether or not—if you apply things to the exterior of the cell, it is difficult to know whether or not it goes into the inside. Whenever—when these radioactive materials came into being, one could separate in the single cells—one could separate the inside from the outside and put first the one part and then the other part under the Geiger-Muller counter and find out just how much of the radioactivity went into the cells.

Q. Were you ever paid anything directly for this aid you gave to him?

A. You mean by the university?

Q. Yes; anything directly for the work you did for him.

A. Well, for him——

Q. Well, helping him to research and delivering his paper for him? [19]

(Testimony of Matilda M. Brooks.)

A. Oh, no. Except I got my board and room, if that's what you mean.

Q. You were not paid any direct sums from——

A. No.

Q. ——the university? A. Oh, no; no.

Q. And actually he didn't pay you any money directly? A. Oh, no.

Q. Even though you got your board and room.

Mr. Moore: I would like to offer into evidence at this time a document relating to his salary.

Mr. Boyle: I object to this on the grounds it has no materiality to our case.

The Court: Can you tell me what it is?

Mr. Moore: Yes, your Honor. It's a schedule of the salaries paid to Professor Brooks, Sumner C. Brooks, when he was with the university, our theory being that to a certain extent she helped him earn that salary.

The Court: Maybe she should have paid tax on it.

Mr. Boyle: He was dead by 1948, and our years are 1952 and 1953, so she could not be a partner, in any situation.

The Court: Objection sustained. I don't think that that is relevant or material.

The Witness: May I say something with reference [20] to this work; that the work that I gave at the Farraday Society was the first paper on the penetration of radioactive material into living cells.

Q. (By Mr. Moore): Now, while you were with

(Testimony of Matilda M. Brooks.)

the university, you carried on independent research activities; is that not correct?

A. That's right.

Q. And throughout the period to the present time you received so-called grants and other monetary help for your research activities?

A. That's right.

Q. I will name some of these grants, and if you could tell the Court what they related to. You received some from the National Academy of Science, the Bache Grant?

A. They call it Bache.

Q. In 1927 through 1932. What was that grant applied to?

A. That grant was for the purpose of collecting the single cells in Florida, and also for buying chemicals to test them with. And they were transported to Woods Hole, to Massachusetts, at the laboratory there where I stayed during the Summer.

Q. And you went to Florida to do that?

A. Yes. [21]

Q. Was the Bache Grant applied as to the South Seas?

A. Yes. Then they gave me a grant to work on some of these cells which were found in the Isles of Tonga, which is—which are in the Fiji Archipelago, and that was for travel and living expenses.

Q. I see. So during that—complete living expenses while you were there and traveling to and from?

A. That's right.

Q. The Academy of American—Academy of

(Testimony of Matilda M. Brooks.)

Arts and Sciences Grant? You received \$900 in 1949?

A. That's right. That was for the purpose of buying a spectrophotometer to do some spectrophotometric analysis of blood pigments which I was working on in connection with my cyanide work; and also for assistance for—in the laboratory; that is, people to help me.

Q. And the National Research Council, 1930 to 1931. You were given a grant for laboratory space in Naples?

A. That's right.

Q. And just what was that?

A. That was just for the space of a room to work in, which was—there was no—no money for sustenance.

Q. And throughout your association with the university at various periods you have received various grants from funds that are administered by the university?

A. Yes. It is called the Board of Research of the [22] University of California; and every year they would give me some money to buy things with, that is, chemicals or assistants. I had some people working for me; or animals or things like that.

Q. And, generally speaking, they average approximately three to four hundred dollars a year?

A. That's right.

Q. And in 1937 you received an Elsasachs Plotz Research Fund Award; you were one out of 30 all over the world that received that award and it was approximately worth \$500?

(Testimony of Matilda M. Brooks.)

A. That's right.

Q. Each time? A. That's right.

Mr. Boyle: What are you reading from, counsel?

Mr. Moore: My trial notes. I am shortening it. If I can ask her these questions, I think it would be quicker to do it this way.

Q. (By Mr. Moore): And what was—were these funds applied? What type of research were they?

A. That was for assistance, the same as the others, and any—you see, the university didn't have a lot of these apparatus like the Beckman's spectrophotometer which I got.

Q. Call it apparatus from now on unless it is really important. It will be easier on the Reporter.

And in '43, you received an aggregate of \$6,000 from the Kappa Alpha Beta Fraternity—it is a sorority called a fraternity.

A. That was for the same purpose.

Q. I see.

A. Travel and expenses in connection with research. That is, assistants. Most of it went for assistants.

The Court: Now, were all these grants made under conditions whereby the person or the society that was making the grant controlled the work you did and the supervision?

The Witness: Oh, no, no. You never do that.

Mr. Moore: I have an exhibit I would like to offer as an example of the condition of the grant, your Honor.

(Testimony of Matilda M. Brooks.)

You have a photostat of this. I would like to offer that into evidence.

The Court: What is it?

Mr. Moore: It is an agreement between the American Philosophical Society and the undersigned recipient of a grant from the Penrose Fund, Grant No. 1276, dated October 30, 1950.

The Court: Is this a typical arrangement between one of these grantors and Dr. Brooks?

The Witness: Yes.

Q. (By Mr. Moore): Do you want to glance at that to make sure that it [24] is?

A. Yes. I know that. You see, the grantee agrees that—there is no use reading it.

Q. That is a typical condition?

A. Yes; that's right. That is, they don't tell you what to do. You tell them what to do and then you get the money.

The Court: All right. It will be admitted in evidence.

The Clerk: Petitioner's Exhibit No. 15.

(Petitioner's Exhibit No. 15 was received in evidence.)

Q. (By Mr. Moore): And that recently in 1953 you received the National Research Council Grant to use a laboratory in Naples, the value of such grant being \$750? A. That's right.

Q. And in 1953, 1954 and 1955, you received grants to use laboratory space at the Marine Laboratory—

(Testimony of Matilda M. Brooks.)

Mr. Boyle: I object to the later years. They are beyond our years. '53 is our last year.

Mr. Moore: Well, we are just trying to show her over-all status, your Honor, and I feel——

The Court: Well, I will let you go a year beyond the taxable years. What would that be? [25]

The Witness: '54.

Mr. Moore: '54.

The Court: All right.

Mr. Moore: Strike reference to '55.

Q. (By Mr. Moore): In '53 and '54 you received a grant from the University of Paris to use a laboratory space at the Marine Laboratory at Banyuls—B-a-n-y-u-l-s?

A. In Southern France; that's right.

Q. And in 1949 and 1950 you received \$400 from the American Philosophical Society—that's the Penrose Fund Grant, an example of that—which you used to pay for laboratory space?

A. That's right.

Q. At the Marine Biological Laboratory in Woods Hole, Massachusetts? A. That's right.

Q. And most all of these grants, except those we referred to as being administered by the University of California, except the Kappa Alpha Beta Grant——

Mr. Boyle: I object to this. Let her testify as to that.

Mr. Moore: Well, you wanted to ask a question?

The Court: Well, I can see now that the question is leading, and if there is an objection——

(Testimony of Matilda M. Brooks.)

Mr. Moore: Surely; surely. I will strike the question.

The Court: All right.

Q. (By Mr. Moore): Were you offered a position in the 20's at any university?

A. Oh, yes. Before I came out to California the Hunter College in New York City wanted me to be the head of their physiology department, and they pay good money. They offered around 9,000.

Q. And did you accept the position?

A. No. I came to California instead and got nothing.

Q. Had you been given any other offers for similar type salary positions?

A. Well, I haven't—I haven't gone into that at all because I have been living here ever since. After my husband passed on, some of the people at the University of Pennsylvania wanted me to come there and they would get me a position; but I decided that I would prefer to continue my work, which has been going on in California, and stayed in California.

Q. Now, while you have been at the university and associated with the university, up to and including the end of the year 1955, what privileges were you given by the university? I mean what so-called faculty privileges were you given by the university? [27]

A. Oh, well, I was given faculty privileges in the library and a permit for entering the campus, and the Men's Faculty Club gave me a courtesy permit. And, of course, I have a room—I have been

(Testimony of Matilda M. Brooks.)

given a room and all sorts of materials and animals to work with and—well, general miscellaneous that goes with doing research.

Q. Do you mean a room? A. Yes.

Q. Do you call it that or do you call it—

A. No. It's a room. It's a room in the Life Science Building.

Q. Now, Mr. Boyle referred to a laboratory. Is that the laboratory?

A. Well, some people call it a laboratory and some call it a room. It is a laboratory because it has the sinks and all those things in it, if that's what you mean. It's the same thing. We never distinguish room and laboratory in those buildings. You just either call it a room, and that's all there is to it.

The room is a large—large enough room so I can do not only my research, and have a desk and all that sort of thing, tables and so forth.

Mr. Moore: Now, I would like to offer into evidence—I will check with counsel.

Mr. Boyle: Well—— [28]

The Court: Well, Mr. Moore, if you are going to make an offer I would like to know what the document is and what it purports to be, if you can identify it for the record and have Dr. Brooks identify it.

Mr. Moore: Yes.

Q. (By Mr. Moore): Dr. Brooks, will you identify that document?

A. Oh, yes. This is the — written on the paper headline of the regents of the University of California and it says: "This is to certify that Dr. Ma-

(Testimony of Matilda M. Brooks.)

tilda Brooks holds appointment as research associate in biology in the University of California, having been a member of the faculty since July 1, 1927."

Would you like to see it?

Q. Will you explain the reason the date has been changed?

A. Oh, yes; the date. That was made for 1943, and then in 1947 when I went down there I said, "Well, what about getting one of these?"

They said, "Oh, just change the date. They won't know the difference."

So I did that, for the benefit of the people down in South America. As a matter of fact, I never had to use it.

The Court: Are you offering this?

Mr. Moore: I would like to offer it into evidence.

Mr. Boyle: I have no objection to it going in as something issued by this man, but any conclusion therein I would object to that. That's one of the issues in the case.

Mr. Moore: May I put the photostat in?

The Court: You may offer the exhibit and we will accept it into evidence and you may substitute a photostat for it.

The Clerk: Petitioner's Exhibit No. 16.

(Petitioner's Exhibit No. 16 was received in evidence.)

Mr. Moore: And also this is a letter dated October 21, 1955, from the assistant controller at the university to Mr. Nicholas Aviani of the Bureau of

(Testimony of Matilda M. Brooks.)

Internal Revenue, the original of which I believe you have in your file.

Mr. Boyle: Well, if your Honor please, the purpose of putting these in, I take it, is to prove the truth of what these people are saying with regard to the Petitioner's status in the university, and I object to this as I don't know that Mr. Stevens was the cause of having this document issued or even that he prepared it. We have been over to the university and we have sat down and gone through the records, and I don't think this is the proper way to attempt to prove what her status is.

The Court: Let me see the letter. [30]

Mr. Moore: I want to offer it merely for the purpose of showing that Mr. Stevens—that the publications under the name of the University of California would not be allowed unless she was at least connected with the university in some capacity.

The Court: Well, as long as there is an objection to this offer, the objection is sustained.

Mr. Moore: Thank you, your Honor.

Q. (By Mr. Moore): Dr. Brooks, other than the travel relating to 1952 and 1953 and the trip to the South Seas and the trip to South America and the travel trip to England in regard to the Faraday Society, and other than the travel in relation to public health service, did you take any other research trips prior to 1955? Do you understand the question? In other words, other than the ones we have already referred to in your testimony?

(Testimony of Matilda M. Brooks.)

A. Well, I went to Turkey from Naples to a medical association.

Q. No. Other than the 1952-'53 travel.

A. Oh. Up to 1955? I think that's all.

Q. How about some high altitude research?

A. Oh, yes; that's right; '47. In 1947 I went down to the High Andes in Peru to experiment on mountain sickness and a remedy, which is connected with the same type of work [31] I had been doing called oxidation reduction; because, you see, when you are in a high altitude you don't have enough oxygen, and if you can substitute something for this lack of oxygen, then you can eliminate the mountain sickness which you get in the high altitudes. And the thing which I worked on was methylene blue, which I used for cyanide poisoning and monoxide poisoning in some of my previous work.

Q. You are familiar, Mrs. Brooks, with the articles and publications elicited in President Sproul's report to the Committee of Finance and Business Affairs?

A. Which ones are those? I don't understand.

Q. I will show you Exhibit 5-E, which is in evidence; these various publications.

A. Oh, yes; oh, yes, of course; yes.

Q. And you prepared those publications—you authored those publications while with the university—while associated with the university?

A. That's right.

Q. And in connection with research carried on

(Testimony of Matilda M. Brooks.)

there and also research carried on with the public health department? A. That's right.

Q. In addition to those articles listed therein, so-called magazine-type articles, did you author or co-author any other type of publication?

A. Well, I have about 100 publications to my name, plus [32] one book with my husband. The book was with my husband. Is that what you mean—published in the various scientific journals all over the country.

Q. I am referring to the book.

A. And Europe. Oh, the book?

Q. Yes. You published that with your husband?

A. Yes; that's right.

Q. And you both worked together on that book?

A. That's right.

Q. When you authored these articles, was there any reference to your association with the university; and, if so, what was it?

A. Oh, always. You always put down that you are research associate in the University of California, Berkeley, California.

Q. In order to be able to put such a designation down, do you need to get permission with anybody from the university?

A. Well, they usually—well, you see, it's more or less of a nominal idea, because if you had—have this appointment they assume that—that your work is worth publishing, and it just goes through normally—normal channels.

(Testimony of Matilda M. Brooks.)

Q. Now, you were a research associate without salary until sometime in 1952?

A. That's right. [33]

Q. Then you began receiving—you received for the academic year 1952 to 1953 and 1953 to 1954 an amount of \$500 per annum? A. That's right.

Q. Also during the year 1952 you received \$500 in a lump sum?

A. That's right; retroactive. The 250 was retroactive.

Mr. Moore: This was stipulated to, your Honor, but I am just trying to tie it together here.

Q. (By Mr. Moore): As to the other than the lump sum, all subsequent payments, were they lump sums or how were they paid?

A. No. That was all by the month, per month; so much per month.

Q. And do you remember roughly what the net amount was they paid you?

A. The net amount was \$34.16.

Mr. Boyle: Well, now, counsel, the record may be confused. We have stipulated to all these amounts.

Mr. Moore: Well, I am just adding the fact that the amounts were paid but that they were paid in installments.

Mr. Boyle: We have stipulated how they were paid; the installments, too. That's part of the stipulation.

Mr. Moore: No. I don't think it's in there.

Mr. Boyle: It's in Paragraph 6. [34]

(Testimony of Matilda M. Brooks.)

Mr. Moore: No, no. It stipulates the total amount paid. It doesn't say how it was paid. It says wages, total wages for 1950, \$749.96 and withholding \$49.98. I am just saying this 500 was a lump sum and that—which was related to the '51-'52 amount, and then the balance was paid in installments. It is not in the stipulation, I don't think.

The Court: All right. Let's get ahead with the testimony.

Q. (By Mr. Moore): Now, in addition you received a thousand dollars from the university during the year 1952. What did you do, if anything, either conduct or bringing to the attention of the people or otherwise prior to receiving the thousand dollar sum and the \$500 payments?

A. Oh. Well, the Internal Revenue Bureau has been after me ever since my husband passed on, and I think the regents were just sick and tired of the whole story. So they decided to give me this gift of a thousand dollars to begin with and to pay my taxes, and then for each year \$500 was also given me; but I didn't realize at the time it was given to me that it had anything to do with the tax. That was my own idea.

Q. Let's break it down. Did you do anything more than bring your tax problems to the attention of the regents?

A. Well, I had quite a session over in San Francisco [35] and another session in Oakland and another session in San Francisco, if that's what you

(Testimony of Matilda M. Brooks.)

mean. I have been having these sessions now for ten years.

Q. That's about the tax? A. That's it.

Q. I mean in reference to the—what I am trying to—what I want to tell the Court is what you did that caused these payments to be made to you.

A. Well, of course, I—I contacted Mr. Underhill, the Secretary of the Board of Regents, and Mr. Lundberg, who was the controller at the time, and they both decided that something should be done about it, and they brought it to the attention. I also contacted President Sproul, and between them all they finally decided, after so many different meetings they had, that something should be done about it.

Q. Now, did you request that they make these payments to you? A. No.

Q. When your appointment was changed from without salary to with salary, did you just receive that? I mean what was said in connection with that change to you, if anything?

A. Nothing. I just got a notice. Instead of saying "without salary" it said that a salary of \$500 per annum—that's all it said. [36]

Q. I see. I want to pin this down. You realize they had various meetings; these meetings are in the stipulation. They had various meetings. You read the stipulation?

A. Well, I read the stipulation, but I didn't realize that they had as many as that, because I didn't

(Testimony of Matilda M. Brooks.)

think that—that the problem should have been carried on to such a large extent as it was.

Q. I see. Well, after you brought this tax problem, this 1947-'48 tax problem, to the attention of the regents, did you follow this through?

A. What do you mean?

Q. Well, I mean in other words did you keep contacting or anything? Or did you just drop it in their laps and——

A. No. Oh, you mean the regents?

Q. Yes.

A. Oh. Well, the 1947-'48 went on and on, and then they had this difficulty over there in San Francisco——

Q. No, no. In other words, you testified that you told the regents that——

A. Oh, yes.

Q. ——about your tax problem?

A. That's right.

Q. Now, after once telling them about your tax problems—— [37]

A. No. I didn't do anything at all.

Q. In other words, then, you just gave them your problem and then——

A. That's right.

Q. The next thing that you heard was——

A. That's right.

Q. You received some money?

A. That's it.

Q. Now, do you know in your own knowledge whether you are required to perform any activities

(Testimony of Matilda M. Brooks.)

while at the university, or I should say—strike that, please. Withdraw that question.

Do you know of your own knowledge whether during the years 1952 and 1953 you were required to perform any activities for the university?

A. You mean in the way of research?

Q. In any type of activity. In other words——

A. Well, I was required to do research, if that's what you mean. Otherwise I wouldn't have gotten the 500. Is that what you mean?

Q. That's what I mean.

A. Yes; that's right.

Q. Now, are you required to make any reports of your research activities to any persons?

A. Well, one usually does that every year, and you put [38] in an annual statement of what you had accomplished and what you hoped to accomplish, and you put that into the head of the department in which you are, which I have done ever since.

Q. Which you have done?

A. I have done that, yes.

Q. When did you begin doing that?

A. Oh, heavens; way back.

Q. Way back? A. Yes.

Mr. Moore: I have copies of the report she made. I don't think that's necessary.

Mr. Boyle: No.

Q. (By Mr. Moore): What is your understanding as to the effect of terminating your association with the university during an academic year while

(Testimony of Matilda M. Brooks.)

you are appointed by—while you are still appointed as a research associate with salary?

A. What do you mean? What is the effect?

Q. Yes; what would happen to the——

A. 500?

Q. Yes.

A. I just wouldn't get paid. You see, I get paid by the month, and if you terminate your appointment at any time during the year, why, you just quit getting paid at the time you terminate. [39]

Is that what you mean?

Q. That's what I mean. A. I see.

Q. Is this your copy of a withholding statement for the year 1953? A. That's right.

Mr. Moore: I would like to offer that into evidence.

The Court: What is the purpose, Mr. Moore?

Mr. Moore: Well, it gives her employee number. The issue here is whether or not she is an employee.

The Court: Well, it is stipulated that certain amounts were withheld by the university, is it not?

Mr. Moore: Yes.

The Court: And the W-2 information is also stipulated. I don't think that is necessary.

Mr. Moore: I withdraw my offer.

The Court: It seems to me it would just be cumulative.

Mr. Moore: Yes. We will keep the file as thin as possible.

Q. (By Mr. Moore): Now, during your association with the university, up to and including 1955,

(Testimony of Matilda M. Brooks.)

what was the main area of research that you performed, if you can generalize? [40]

Mr. Boyle: Well, now, I object to that as irrelevant to the issue.

Mr. Moore: Well, I am tying in the public health research with the research she did on her trip, or why did she go to the Mediterranean.

Mr. Boyle: Well, unless you tie it into our years, either 1952 or 1953 or right before, I object to the question. I don't want her to go back into the 20's on the public health.

Mr. Moore: No; we have already as to public health. I just want the Court to have a general idea of the type of research she does.

The Court: When?

Mr. Moore: While she was with the university and up to the present time.

The Court: Well, all right. You may answer that.

A. I can answer it very briefly. You see, the work I have been doing ever since the cyanide—do you want me to talk about the cyanide work? You see——

Q. (By Mr. Moore): Just a brief statement on that.

A. You see, I have been working on the oxidation reduction potential; that is, the effect of the amount of oxygen upon a living cell. And if you take the oxygen away from it, what happens to the cell.

Now, that is the gist of the whole thing I have

(Testimony of Matilda M. Brooks.)

been [41] studying, and back in 1932 was when I found methylene blue and the antidote for cyanide and carbon monoxide poisoning. And I think you have some things there which show that.

President Sproul put that in his 1932—one of the two principal research discoveries of that year in his yearbook, which shows just about what the university thought of my work at that time, so forth. And I have been following that line all along in various ways. For example, the mountain sickness is in the same line, because if you take oxygen away, as I said before, from the participation of the metabolism of your body, then you get certain abnormal results. And at the present time I am working with the same idea on sea urchin eggs and their development and growth, as concerns normal and abnormal growth, which is along the same line which I have done before.

Q. And you have also done some research regarding—— A. Nitrate.

Q. ——headaches from nitrate fumes?

A. Yes. You see, when you have these nitrate headaches, what you do is you eliminate some hemoglobin from your circulation. In other words, you oxidize the hemoglobin from your circulation. In other words, you oxidize the hemoglobin and produce what they call methemoglobin and this does not participate in taking in oxygen. I mean a certain amount of blood is then eliminated, and then if you [42] don't have enough blood circulating

(Testimony of Matilda M. Brooks.)

through to pick up oxygen, then you get these headaches.

Now, glucose——

Q. Well, I think his Honor gets the general idea. A. Yes.

Q. I wanted just to give the general idea on that.

Now, has your work been recognized by—withdraw that question.

President Sproul has reported to the university stating that you had been listed in American Men of Science in the 8th edition published in 1949 for your contribution to research, etc. Have you been so recognized by publication of your name in any other similar type books?

A. Yes. I am one of these—I think Who's Who among American women is just coming out. I am in that. And then there is another one, I think, of something about Western Women, important Western women. But I don't remember the title of that. That was out about ten years ago.

Q. And it is true, is it not, that March of Time sometime in the 1930's had devoted a radio program to the dramatization of the use of cyanide for an antidote? A. The use of methylene blue.

Q. As an antidote for cyanide and carbon monoxide poisoning?

A. Carbon monoxide poisoning. [43]

Q. Which you discovered?

A. That's right.

(Testimony of Matilda M. Brooks.)

Q. And also the university had a local radio program dramatize—— A. Well, see——

Q. Dramatize——

The Court: Why don't you let Dr. Brooks testify? You have been doing most of it.

Mr. Moore: I am just trying to speed it up, your Honor.

The Witness: Yes. Well, what that was, you see in 1932 when—I don't know if you remember that or not—when that cyanide gas came out, well, the methylene blue work was the paper I gave at Stanford University that time showing that methylene blue—I did a lot of work with rats and mice at that time and showed that methylene blue cured these mice and rats if they had been poisoned with cyanide. Before that everybody that took cyanide died because they didn't have anything.

The same thing with carbon monoxide, and that was dramatized by the March of Time—one of the March of Time dramas in the 30's.

After I came back from the Andes the University Explorer put my work in one of those Ceilings Unlimited in which they devoted an hour, which they do every Sunday, I [44] think, over the radio.

Q. (By Mr. Moore): Dr. Brooks, these are letters sent to you from various persons regarding your research? A. That's right.

Q. In regard to carbon monoxide poisoning?

A. And cyanide.

Q. And cyanide poisoning?

A. You see——

(Testimony of Matilda M. Brooks.)

Mr. Boyle: Just a minute.

The Court: As long as counsel asks a question, try to stick to it in answering. I mean "yes" was the answer to that question. Now, what else do you want to ask about these documents?

The Witness: May I say something?

The Court: Well, I don't know.

Mr. Moore: You are not supposed to answer unless I ask a question.

The Witness: I see.

Mr. Moore: According to the rules of the game. Well, I would like to offer these into evidence.

The Court: For what purpose?

Mr. Moore: To show further recognition of her work in regard to cyanide poisoning.

The Court: Well, there is no dispute about that, [45] I would take it, is there?

Mr. Boyle: No dispute.

Mr. Moore: All right.

The Court: There is no dispute here about the quality of petitioner's work or its importance. The question is: Was she in the business or profession for profit; what did she get out of it?

I could get a lot of testimonial letters, but that wouldn't produce any income. It adds to my satisfaction in what I have been doing.

Mr. Moore: In the proposed stipulation I wanted to stipulate to the value. And it is true now that you are willing to stipulate that the expenditures listed in the 1952 and 1953 returns in regard to travel to Europe were in fact made? To what

(Testimony of Matilda M. Brooks.)

extent do you wish to stipulate in that regard?

Mr. Boyle: I will concede that those amounts were spent for the purpose for which they were claimed to have been spent.

Q. (By Mr. Moore): Now, I believe you have told the Court why you wanted to go to the Mediterranean? A. Well——

Q. Well, let's—why did you go to Europe?

A. Well, I went to Europe for the same reason that I [46] went to Miami and the same reason I went to Bermuda and the same reason that I went to the South Seas; because in the southern part of France and in Naples there are certain organisms which grow there and they don't grow anywhere else in this part of the world. And in order to do my research there, I had to use these animals to show that the theory and the fundamental idea underlying my research is applicable to more than one species of animal or plant.

Q. Now, during the year 1952 were all of the expenditures stated in your 1952 income tax return as travel to Europe expenditures—I believe that's the way it is so entitled—were they spent in connection with your research activities in Europe?

A. Oh, yes.

Mr. Moore: The only question in my mind, your Honor, is I am still not—you stipulate they were spent. I want to know how much detail to go into.

The Court: I understood the stipulation to be they were spent for the purposes for which they were claimed on the income tax return. Certainly

(Testimony of Matilda M. Brooks.)

she wasn't claiming them as being night club expenditures or entertainment or anything of that kind.

Mr. Moore: That's right.

Counsel, in regard to the professional societies, do you want to make the same stipulation or do you want [47] testimony concerning it?

Mr. Boyle: No. I will agree that——

Mr. Moore: By the way, we will stipulate that \$4 allocated to the Cooper Conservation on the 1952 return, we will concede that that was a charitable contribution and not a business expense and that the \$4 allocated to Cooper Conservation and the \$3 allocated to the University of Pittsburgh on the '53 return also were charitable and had no relation to her scientific activities.

Mr. Boyle: Well, then, with the exception of those two that you have taken out and without characterizing what they constitute, I will agree that the amounts she has claimed on her 1952 and 1953 return as amounts spent for professional organizations were spent for that purpose.

Mr. Moore: As to Cooper Conservation, you are not stipulating that it was a charity?

I might as well get it in.

Q. (By Mr. Moore): What was the amount paid for Cooper Conservation?

A. That was \$4.

Q. What is Cooper Conservation?

A. That's for birds; conservation of birds.

Q. And the University of Pittsburgh?

(Testimony of Matilda M. Brooks.)

A. Well, that was just the donation for the alumni association. [48]

Q. Now, what results, if any, did you arrive at due to your trip to Europe for research purposes?

A. You mean in 1952-'53?

Q. Yes.

A. Yes. Well, I worked with certain marine eggs there which, as I stated before, grow only in those regions. And I found that the experiments which I did on the eggs in those regions were authenticated—authenticated the work which other people had done so I could bring the two together and make a statement that there was an agreement with other peoples' work.

Q. Did you author any publication regarding the research activities in 1952 and 1953?

A. Yes. One was published at the marine station in Viet Milieu and the other was in a journal called "Growth" which is published in this country.

The Court: Did you get paid for them?

The Witness: No.

The Court: Recognized but no pay?

The Witness: Yes. You see, in—I should say this: Everybody that works in science, no matter whether they are students, professors, or what they are, never get paid for what they publish unless they write a special book or something like that. But these articles that go into the journals are not like the magazine articles where people write [49] and get a lot of money for them; but everybody that does research does not get paid.

(Testimony of Matilda M. Brooks.)

The Court: They are professional journals?

The Witness: Professional journals, that's right.

Should I say just part of the buildup in trying to establish oneself as a professional person and in trying to make your status so that you can eventually get more or less of an income.

Q. (By Mr. Moore): President Sproul has mentioned your election to scholarly organizations and he has listed five of them, one of which was the Phi Beta Kappa, honorary membership in Phi Beta Kappa. Why and when were you elected membership in that?

A. Well, I was given that honor back in '30 when I did my cyanide and carbon monoxide work, and the methylene blue is an antidote to these poisons.

Q. Have you been elected to any other Greek letter society?

A. I was elected to Sigma Chi long ago, too. That's a scientific society associated with the Phi Beta Kappa.

The Court: Sometimes you can get both, can't you?

The Witness: That's right. But I mean as far as I'm concerned I don't know of any other ones that I could be elected to.

Mr. Moore: I wanted it that way so I wouldn't have to lead you.

Q. (By Mr. Moore): And the other four societies and organizations, Society of Experimental Biology, Western Society of Naturalists, Bermuda

(Testimony of Matilda M. Brooks.)

Biological Corporation, and Marine Biological Laboratory of Woods Hole, Massachusetts, could you make a general statement to the Court to pretty much apply to all four of those?

A. Yes. They are all laboratories where one does research and where I have done part of my research, and some of them you have to be a member of the corporation, which I am, of the Bermuda Biological and also the Marine Station at Woods Hole, and in order to do some work there. And they all publish journals and so forth and you are permitted to publish in these journals.

Q. Now, Dr. Brooks, so far, at least, in the years 1952 and 1953 you have not made what we would call a net profit from your activities?

A. That's right.

Q. How, if at all, do you expect to make a profit from your research activities in the future?

A. Well, I am hoping that—you see, there are a great many foundations now, many more than there used to be, and I am hoping that by keeping up my activities in this line of work and also in publishing along these lines that I will [51] be able to attract some funds from some of these foundations as salary, because they give large amounts, up to, I think, 7,000; 5,000; 7,000 in certain cases. And I am hoping to be able to be—to attract some of that money.

The Court: As salary?

The Witness: As salary, yes.

(Testimony of Matilda M. Brooks.)

Q. (By Mr. Moore): And did you have that intent in 1952 and '53?

A. Yes; that is right.

The Court: Mr. Moore, have you any idea how much longer you will be?

Mr. Moore: It is just a few more minutes.

The Court: Otherwise, if you are going on for some time, I would take a little recess and maybe give Dr. Brooks a chance to get up out of the chair.

Mr. Moore: It won't be more than a few minutes.

The Witness: It is all right with me.

Mr. Moore: I am thinking right now. Maybe if we take a recess I will—we can take a recess now. I only have around 15 more minutes.

The Court: Let's continue.

Mr. Moore: I am trying to draw things together and see what I left out.

The Witness: I brought some samples of gifts there.

Q. (By Mr. Moore): Yes.

A. To show just, you know, what sort of thing the fellowships—the value of these fellowships and so forth.

Mr. Moore: You don't know if—you agree that I can't offer these?

Mr. Boyle: Well, I will concede that there are hundreds of thousands of dollars available in this country in the form of grants and aids and so forth. But I don't see how that will bear on our

(Testimony of Matilda M. Brooks.)

issue here, the fact that that money is available.

Mr. Moore: Well, the issue is whether—the ultimate issue is whether it is available to her, but it has to be available to persons that do research.

Mr. Boyle: I will concede that large sums are available in this country to people doing research.

Mr. Moore: Then we don't need them.

The Court: Sometimes when the issue gets into our court as to the nature of those funds the recipient generally argues it is not income, it is a gift, not taxable; and I have so held.

Q. (By Mr. Moore): When you are referring to this opportunity as salary, are you referring to fellowships?

A. Well, fellowships, yes; yes. You see, there are these—there are a number of fellowships, as you probably [53] know: The Guggenheim and the Miller is one of the latest; the Rockefeller Foundation, the Ford Fund, and all those things. Those are the ones I am referring to.

Q. In other words——

A. Fellowships for salary.

Q. In which you live on the money?

A. You live on the money; that's right.

Q. And get the \$300 a month?

A. That's right.

Q. According to the '54 Code.

Do you have any ideas about possible value of your research to modern ills? If so, what possible value?

(Testimony of Matilda M. Brooks.)

A. You mean like the Salk Vaccine or something like that?

Q. Yes; without——

A. Well, I will tell you. The kind of work I do is what you call fundamental research and you are never supposed to apply this to anything and say, "Now, I am going to discover this." If you do discover something, it is usually a sideline. You don't just deliberately unless for—except that cyanide antidote. That's a different story.

But in all this work I am doing now with the single cells, you don't say that this is—you call it abnormal growth; you don't call it anything else. You don't call it cancerous. That's one thing that's not allowed in pure science. [54] And the work I do is pure science and the work I do is fundamental. It is basic research, which is something which is not necessarily applied to curing illnesses or anything like that. That's the thing I think you want answered, isn't it?

Q. To summarize, you don't want to say more than — you have been doing stepping-stones throughout——

A. That's right; stepping-stones, that's right.

Q. In other words, you have been doing a little bit here, a little bit there, and all relating——

A. All relating to the same thing, oxidation reduction.

Q. Then you said you don't want to say you are going——

Mr. Boyle: Let the witness testify on this.

(Testimony of Matilda M. Brooks.)

The Court: I would rather have the Doctor testify.

Q. (By Mr. Moore): Yes.

A. Here is the point. Everybody is getting money for cancer, you see. They call it cancer. And some of the work that they do they call cancer has no more relation to cancer than anything I can think of. But, on the other hand, if it is fundamental, now, for example, you take all the biochemists that are working with enzymes. Now, changes in the enzymes configuration would also be related to cancer, you see.

Now, the public in general is only stimulated by the word "cancer," and a scientist doesn't necessarily say, [55] "Now, I am going to discover something for cancer." That's beyond the pale.

What I am doing is to try to lay the foundation for something in the line of research which can be used to alleviate some of these difficulties which people find when they become abnormal in certain relations to their metabolism. That's all I can say.

Q. Have you applied for any fellowships since the year 1952 and 1953, and, if you haven't, why haven't you?

Mr. Boyle: I object to any years following 1953.

Q. (By Mr. Moore): Well, up to '55, then.

A. No, I haven't, no.

Mr. Boyle: I object to any years following 1953.

The Witness: '53 was the last one I applied for, and I got that at Naples.

Mr. Moore: Well, I haven't heard any ruling on the objection.

(Testimony of Matilda M. Brooks.)

The Court: Well, she confined her testimony to 1953 and I understood there was no objection to 1953.

Mr. Moore: Yes. I thought we were getting one extra year.

The Court: You are not claiming this Petitioner is in the business of applying for scholarships or anything?

Mr. Moore: Not of applying for scholarships, but [56] I think that is—in other words, by maintaining this research activity throughout she is in a position to be either reimbursed or paid taxable income for her research activities.

The Court: Isn't this case developing more along the lines of somebody looking for a job and trying to educate themselves and make themselves known, and sort of advertise?

The Witness: I am already known. I don't have to make myself known. I am known all over the world. I don't need that.

Mr. Moore: She has never changed her status throughout her whole entire——

The Witness: That's right.

Mr. Moore: We are trying to show she has never changed her status throughout her whole entire life.

The Court: She is a person dedicated to biological research.

Mr. Moore: And she has been doing the same general research.

The Witness: But you see the point is before

(Testimony of Matilda M. Brooks.)

my—before my husband died, didn't bother much about fellowships. I think that's what Mr. Moore means. I didn't bother much about fellowships because I was working and I had a place to live, you see. But before that it was important for me to do something to get a salary; and inasmuch as the stock market isn't always 100 per cent, as you probably know, [57] there would be some other reason for getting some money, you know, to keep your—you know, to keep living. And that's what Mr. Moore means, that what I want to do is to keep my scientific ability on a good level so that if I do publish something, which I am doing all along, it will attract some money for some salary. That's the point.

The Court: I don't like to get you mixed up in tax terms, but would you say that what you are doing is in the hope of making a monetary profit?

The Witness: That's right, that's right.

The Court: Well, I haven't got that impression from your testimony. I gathered that you were doing it because this is what you like to do.

The Witness: Well, this is what I did while my husband was here, yes. Since my husband is gone it is up to me to do something to help me to keep on going in the way of a salary.

The Court: Of course, this taxation is a very confusing field, as you know.

The Witness: I know it.

The Court: Go ahead with your questioning. I probably interrupted your thought.

(Testimony of Matilda M. Brooks.)

Mr. Moore: No; you did what I was trying to do without coming right out and doing it.

Q. (By Mr. Moore): And just to—he asked a question about understanding. You understand this difference between just reimbursement for expenditures——

A. Oh, yes. Well, that's not salary.

Q. ——and amounts paid with which you pay for your food and lodging?

A. That's right.

Q. And a portion of which you may pay to the United States Government?

A. That's right.

Q. And you, when you talk about salary, and you are talking about that type of——

A. That's right.

Q. And when you are talking about fellowships you are talking about actually having some money for you to spend for yourself and not for assistance or drugs or animals or something like that?

A. Which is what grants—most of the grants are for, you see.

Q. The grants are, in effect, reimbursed expenses?

A. That's right.

Q. But your future intention is perhaps different?

A. That's right. As I say, when my husband was here it wasn't necessary to think about it; but now it is.

(Testimony of Matilda M. Brooks.)

Mr. Moore: That's all. That's all the questions I have.

The Court: Do you have any further witnesses?

Mr. Moore: I just have a few minutes. In fact, I may not need to put him on.

The Court: Let's take a 10-minute recess.

(Short recess.)

Mr. Boyle: Counsel, just to make sure the record is not confused about the receipt of those payments in 1952, will you stipulate that \$500 was received on June 30, 1952, and \$41.66 at the end of each month thereafter from July through December?

Mr. Moore: I don't know the exact date that that \$500 was received, but it was received in that general time. I am pretty sure it was received——

Q. (By Mr. Moore): Was it received in June, about the middle of the year, the \$500?

A. About that, yes; I think so.

Mr. Moore: Yes. I will stipulate to that. That's from your notes at the office?

Mr. Boyle: Yes.

Mr. Moore: Yes, I will.

Cross Examination

Q. (By Mr. Boyle): Dr. Brooks, how old are you? [60]

A. I am in my sixth decade.

The Court: Does that answer the question?

Mr. Boyle: That's close enough.

The Court: All right.

(Testimony of Matilda M. Brooks.)

Q. (By Mr. Boyle): Did you receive money or anything else of monetary value as a result of your trip to Europe in 1952 and 1953?

A. No.

Q. Your answer is no?

A. That's right.

Q. Did you receive anything from the American Philosophical Society, the so-called Penrose Fund, in 1952 or 1953?

A. I think—don't you have the record of that? Was that in '50 or '51? I don't remember. I got funds from the Penrose Fund for several years, and whether I got that in '52 or '53, I don't know. I think it was '49, '50.

The Court: The date of the exhibit that I have here is October 30, 1950.

The Witness: Yes. I think that was it.

Q. (By Mr. Boyle): October 29, 1949?

A. Well, there were two. There was 1949 and there was '50. There are several of them that I got, but I don't think I got anything in '52 or '53. [61]

Mr. Moore: I gave you the wrong exhibit, counsel; I am sorry. There were two of them and I didn't feel it was necessary to put both of them in evidence.

Mr. Boyle: Did the witness receive anything from this organization in 1952 and 1953?

The Witness: I don't think so.

Mr. Boyle: All right. That's satisfactory.

Q. (By Mr. Boyle): Now, Dr. Brooks, you

(Testimony of Matilda M. Brooks.)

have been in the field of research in pure science for some 38 years; is that correct?

A. Let's see. Yes, that's right.

Q. And you consider yourself a scientist?

A. I do.

Q. And you are known as such?

A. That's right.

Q. And you have been associated in some capacity with the University of California since 1927; is that correct?

A. That's right.

Q. Now, as a scientist were you interested in the betterment of mankind and in the furtherance of science?

A. Well, everybody is interested in the betterment of mankind.

The Court: Oh, that is pretty broad. Are we sure of that?

The Witness: Well, they should be if they are not.

The Court: All right.

Q. (By Mr. Boyle): But at least that was one of your motives; is that correct?

A. Well, you see, it is a difficult question to answer because I can say yes and no, because some of my research is purely fundamental and I don't know where it will lead, you see. But if it happens to lead to something like the cyanide, the methylene blue, as a cure for cyanide poisoning, then I would say yes, because that is for the betterment of mankind. It is a medical discovery.

(Testimony of Matilda M. Brooks.)

Q. All of your research is for the betterment of mankind or can be such; isn't that true?

A. It is. Everybody that does research is for the betterment of mankind.

Q. Now, would you say that you have spent your life as a scientist in this work?

A. Spent my life?

Q. Well, the 38 years, the last 38 years, have you been doing that primarily because it interests you and for the betterment of mankind? Or have you been doing that in order some day to acquire money from it?

A. Can I say yes to both of those things; yes for the betterment of mankind and yes to some day get more money. [63]

Q. What has been your primary motive?

A. They are not usually exclusive, are they?

Q. What has been your primary motive?

A. Just at present, since my husband is gone, it is to see whether I can acquire some salary.

Q. Are you able to live on the money your husband left you?

A. You mean when he left? You mean what I got when he left? I wouldn't have been, no, if I hadn't invested it.

Q. Well, in 1952 and 1953, did you live on your own funds without regard to any other income?

A. Well, I think the facts are right there, aren't they?

Q. I believe they are.

A. Yes. Then you know the answer.

(Testimony of Matilda M. Brooks.)

The Court: Yes, but I don't.

The Witness: Oh, I am sorry. Well, as a matter of fact, when my husband died, I got his retirement fund as an inheritance and I invested that in the stock market, and I have been living mostly on the stock market fund ever since then. But if I hadn't invested it, I couldn't have lived on what I got from the retirement.

Mr. Boyle: Now, if your Honor please, Paragraph 7 of the stipulation of facts refers to this \$1,000 that was received by the Petitioner in 1952 for her tax deficiencies in 1947 and 1948, and that same \$1,000 is explained in more [64] detail in joint Exhibits 7-G, 8-H, 9-I and 13-M.

At this time the Respondent requests permission to amend the pleadings to conform to the proof and to include that \$1,000 in taxable income.

Mr. Moore: Well, it doesn't conform to the proof. It doesn't conform to the proof if it hasn't been proven that that's taxable income.

The Court: It doesn't conform, but it advances a different theory, and I think the Respondent is entitled to amend his pleadings to take care of that.

Mr. Moore: I object on the grounds that it is——

The Court: Well, the objection is overruled.

You have permission to file an amendment to your pleadings.

Mr. Boyle: I ask leave to file the amendment praying for an increased deficiency at this time.

The Court: It will be granted.

(Testimony of Matilda M. Brooks.)

Mr. Moore: And I ask leave to file an amended reply. I mean not an amended reply, but a reply to—or we can deem it being denied, I believe, which will serve the same purpose.

The Court: All right. The record will show that you have entered the denial to the facts that are being pleaded in this amended answer.

Mr. Boyle: That's all. [65]

The Court: Is there anything further, Mr. Moore?

Mr. Moore: Respondent rests?

The Court: He very quietly said that.

Mr. Moore: I don't know whether he rests or not. At least he has concluded his cross-examination?

Mr. Boyle: That is correct. I did not rest yet. I have completed my cross-examination.

Mr. Moore: I only have one question in regard to your cross-examination, and then you will take the affirmative on your amended answer.

Redirect Examination

Q. (By Mr. Moore): Have you dipped into capital, so to speak? A. Oh, yes.

Q. Since you began investing?

A. Oh, since I began investing? Well, I am——

Q. You testified you received an inheritance from your husband?

A. That's right. From the university for my husband.

Q. And that you have invested that inheritance?

A. That's right.

(Testimony of Matilda M. Brooks.)

Q. And lived from it?

A. That's right.

Q. To what extent have you spent capital as distinguished from lived off of the dividend earnings from such investments, [66] and when did you find it necessary——

Mr. Boyle: I object. Let's ask the witness one question at a time and let her answer.

Q. (By Mr. Moore): Have you expended capital—have you found it necessary to expend capital as distinguished from spend the money received from dividends?

A. Oh, yes; oh, yes.

Q. And when did you first find that necessary? When did you begin spending capital as distinguished from only dividends?

A. Well, I think I started——

Q. To your best recollection.

A. I think the year I was in Naples. It was '52, '53. It is difficult to separate.

Q. Yes. Could I refresh your recollection with the return?

Mr. Boyle: Well, the returns are in evidence and they speak for themselves as to what extent she liquidated, if you want to question her about that. Here are the returns.

The Court: Well, gentlemen, do you think that this present line of questioning is material to this case? I don't think it makes much difference whether Dr. Brooks had to reach into capital or whether she could live off of income. Did that influence

(Testimony of Matilda M. Brooks.)

her motive in pursuing her scientific [67] research too much?

Mr. Moore: If the income is steady and you keep your standard of living steady, you can live forever on the capital. But if you have to start taking chunks of capital away, your capital decreases as does your income. And he was raising—apparently raising the point that she didn't need any money.

The Court: That was raised in the Vanderbilt Case, too, wasn't it?

Mr. Moore: Yes, it was. In that case he didn't have any money. But I just wanted to make the point that she can't live on this amount forever; and if she started to dip into capital—that's the point of the materiality of my rebuttal.

The Court: I would guess that. I would know that I mean.

Mr. Moore: Fine.

The Court: The more Dr. Brooks had to get into capital the more interested she might become in trying to bring in or break down some of these grants.

Mr. Moore: Well, that's it. Some of our Judges over in the civil courts don't understand these economic problems quite so readily.

The Court: Is that all?

Mr. Moore: That's all. [68]

Mr. Boyle: The Government rests.

The Court: All right, Dr. Brooks.

Mr. Moore: Wait. Is he going to take the affirm-

(Testimony of Matilda M. Brooks.)

ative on his affirmative plea? That was the question.

Mr. Boyle: I believe I have done it. I believe it is all there in the record. I don't think there is anything necessary.

Mr. Moore: Then I would like to rebuttal to this. I understood there are two parts to a case; first he cross-examines as to our case and then he has his affirmative. That's the question I was going to ask.

Mr. Boyle: Well, my——

The Court: He is resting on the record, as far as the case goes. Do you have further questions?

Mr. Moore: Yes; rebuttal to that.

Q. (By Mr. Moore): When you received this thousand dollars referred to, were there any requirements—were you required to do anything in the future?

A. Oh, no. The thousand dollars—I tell you, I accepted the thousand dollars as a gift because I was having difficulty with the internal revenue people and the university gave me that thousand dollars to settle some of the difficulties.

Q. Did you ask for it? [69]

A. I never asked for it, no. I was surprised when I got it and I was surprised when I got the 500, too.

Q. What did they tell you, if anything, when they disbursed the thousand dollars to you?

A. They didn't tell me anything. They just sent me a check for a thousand dollars. Mr. Landon

(Testimony of Matilda M. Brooks.)

was the one that thought it would be—it was applicable only to the '47-'48 tax. But inasmuch as the '47-'48 tax deficiency—it was so much bandied around that it finally reached the statute of limitations and was discarded by the San Francisco Bureau. And so then I used that for the '50 and—'49 and '50, to pay the '49 and '50, just as I would any—anything else.

Q. Just like any other money?

A. Yes; any other money, yes. But if the university thinks it was only for the '47 or the '48 tax, I can refund it to the university. That's what I wanted to tell you.

Mr. Moore: No more questions.

Mr. Boyle: Nothing.

The Court: You may be excused.

The Witness: Thank you.

(Witness excused.)

Mr. Moore: I rest.

The Court: All right.

How much time do you counsel want to submit briefs?

Mr. Boyle: I would request 60 days, if your [70] Honor please.

The Court: All right. I will give you 60 days for simultaneous briefs; 30 days for reply.

Mr. Moore: Simultaneous briefs; 30-60 days. I have a reply in 30 thereafter?

The Court: That is right, if you care to.

Mr. Moore: Thank you very much.

The Clerk: The brief dates, gentlemen, are the original brief, 60 days, due March 24; the reply brief, 30 days thereafter, is due April 23.

The Court: We recess until 9:30 in the morning.

(Whereupon at 4:55 o'clock p.m., Thursday, January 23, 1958, the hearing in the above-entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed February 20, 1958.

[Endorsed]: No. 16355. United States Court of Appeals for the Ninth Circuit. Matilda M. Brooks, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: February 4, 1959.

Docketed: February 9, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16355

MATILDA M. BROOKS,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

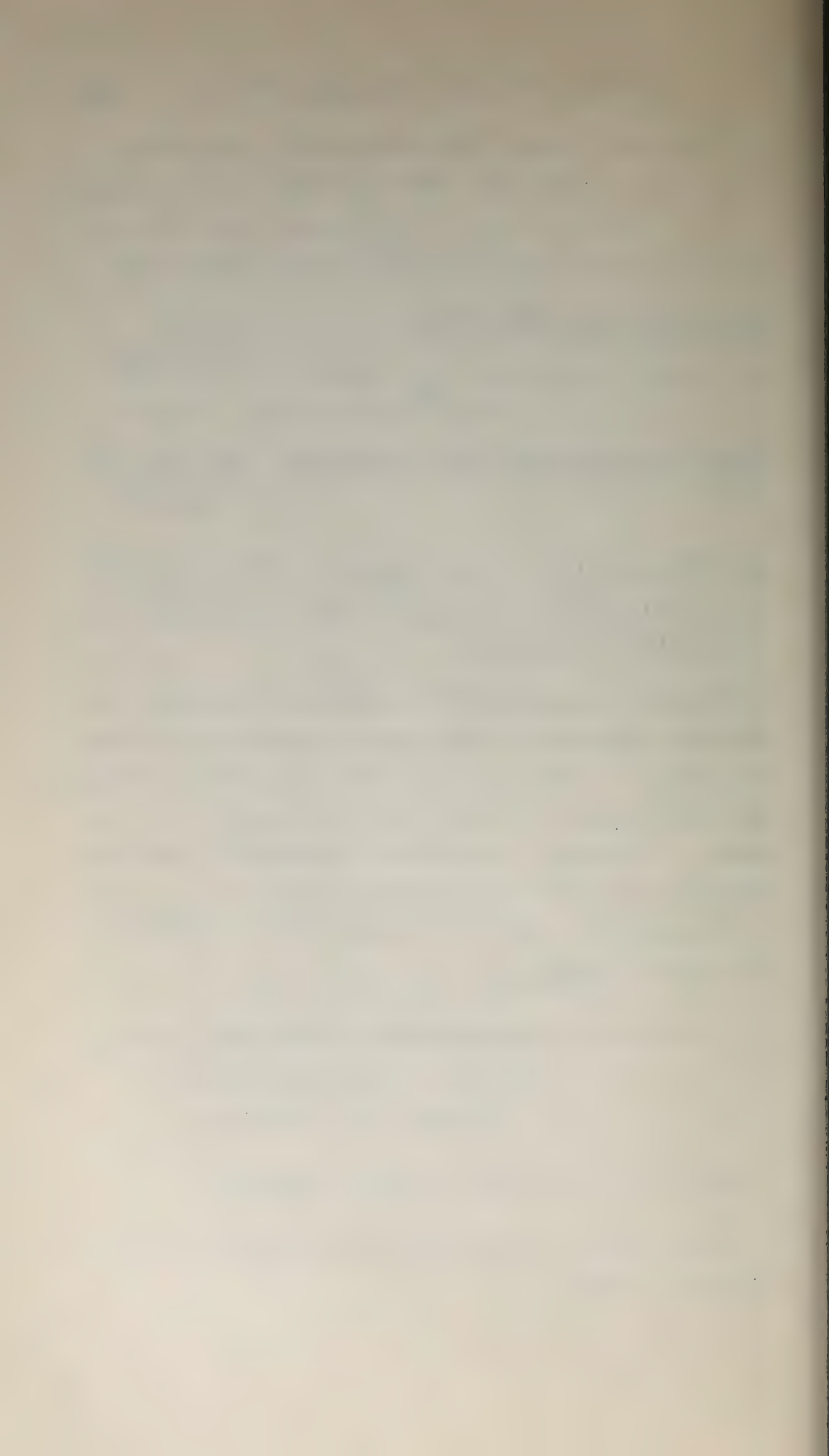
APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD IN
ABOVE CAUSE

Comes now appellant, Matilda M. Brooks, by her attorney, Herbert P. Moore, Jr., and hereby adopts, according to the provisions of your Rule 17(6), the Statement of Points and Designation of Contents of Record on Review heretofore filed by appellant with the Tax Court of The United States on January 19, 1959, and constituting a portion of the typed record.

/s/ HERBERT P. MOORE, JR.
STARK & CHAMPLIN,
Counsel for Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 9, 1959. Paul P. O'Brien, Clerk.



**In the United States Court of Appeals
for the Ninth Circuit**

CENTURY INVESTMENT CORPORATION, APPELLANT
v.

**UNITED STATES OF AMERICA, AND DON S. GRIFFITH,
SPECIAL MASTER, APPELLEES**

VIRGIL J. PAGUE, APPELLANT
v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

UNITED STATES OF AMERICA, APPELLANT
v.

DONALD F. OWENS, ET AL., APPELLEES

EDWARD R. ESTER, ET AL., APPELLANTS
v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION**

BRIEF FOR THE UNITED STATES, APPELLANT

PERRY W. MORTON,
Assistant Attorney General,
CHARLES P. MORIARTY,
United States Attorney,
Seattle, Wash.

JOSEPH C. McKINNON,
Assistant United States Attorney,
Seattle, Wash.

**ROGER P. MARQUIS,
HAROLD S. HARRISON,**

*Attorneys,
Department of Justice, Washington 25, D.C.*

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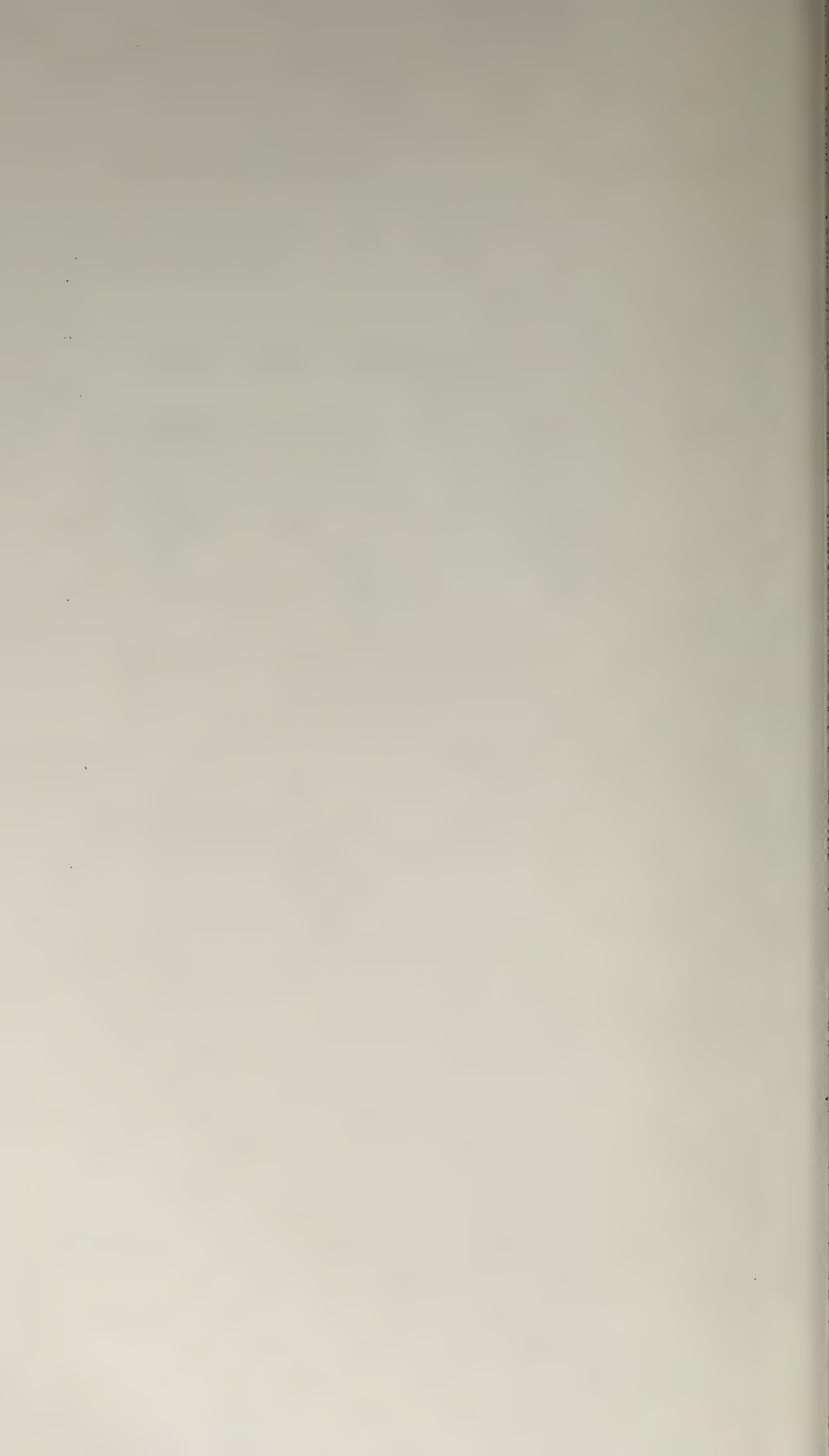
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In the United States Court of Appeals for the Ninth Circuit

No. 16360

CENTURY INVESTMENT CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, AND DON S. GRIFFITH,
SPECIAL MASTER, APPELLEES

VIRGIL J. PAGUE, APPELLANT

v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD F. OWENS, ET AL., APPELLEES

EDWARD R. ESTER, ET AL., APPELLANTS

v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION*

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The District Court did not write an opinion. Its findings of fact and conclusions of law appear in the printed record at pages 63-75. Earlier findings of fact and conclusions of law and supplemental findings

of fact and conclusions of law appear at pages 62–81 and 107–113 of the printed record in the prior appeal to this Court in an earlier stage of this case (No. 15219), which printed record has been designated as a part of the record on appeal in the instant case.¹

JURISDICTION

These are cross-appeals from various orders entered by the District Court. The appeal by the United States is from (a) the final judgment dated September 29, 1958, except that part of the judgment respecting the compensation and expenses of the Special Master and responsibility therefor; (b) the interlocutory order dated July 11, 1958, granting summary judgment in favor of the individual defendants; and (c) the order dated August 22, 1958, denying the motion of the United States for rehearing and reconsideration of the motions for summary judgment (R. 75–77, 22–23, 47–48, respectively). The notice of appeal by the United States was filed November 28, 1958 (R. 81–82). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291. The jurisdiction of the District Court of the suit by the United States rested on 28 U.S.C. sec. 1345.

QUESTIONS PRESENTED

1. Whether, in view of the express reaffirmation by the District Court of its earlier findings and conclusions that the individual defendants had “full and complete knowledge of the contract obligation of

¹ References to the prior record will be indicated as (PR. —) while references to the printed record in the instant case will be shown as (R. —).

Century Investment Corporation that said temporary dwelling be removed from site” and so “were not innocent purchasers of same without knowledge and notice of the contract expressed requirement that said buildings be removed * * *,” the District Court erred in granting summary judgment in favor of the individual defendants and dismissing them from the action to the great detriment of the public interest represented by the United States.

2. Whether the District Court erred in according only token relief to the United States though finding as a fact that it had been substantially damaged.

STATEMENT

This is a later stage of the same case as was before this Court in No. 15219, *Century Investment Corporation v. United States*, 250 F. 2d 139 (C.A. 9, 1957), cert. den. *sub nom. Ester, et al. v. United States*, 356 U.S. 950. A rather detailed recitation of the factual situation appears in the brief for the United States as appellee in that case. Therefore, we simply summarize the factual situation here sufficiently to afford an understanding of the present posture of the case.

In October 1954 the United States filed a complaint seeking redress for the violation of its rights growing out of the failure of defendants² and others to remove temporary war housing from lands the use of which had been acquired by the United States for such housing (PR. 3-22).

² Since the defendants below are both appellees and appellants in the present cross-appeals, reference to them will be as defendants.

By condemnation proceedings instituted during World War II, the United States acquired exclusive temporary use of certain land in Seattle for a temporary housing project, the project being constructed under the authority of the Lanham Act, 54 Stat. 1125, 42 U.S.C. secs. 1521, *et seq.* The Government's term for the use of the land was extended through June 30, 1956. The District Court took judicial notice of all the proceedings and files in the condemnation action (Fdg. II, R. 65-66). By amendments to the Lanham Act, Congress directed that "the Administrator shall, as promptly as may be practicable and in the public interest, remove (by demolition or otherwise) all housing under his jurisdiction which is of a temporary character * * *." 64 Stat. 48, 64, 72-73. In order to comply with this congressional mandate, the Administrator of the Public Housing Administration, through the Housing Authority of the City of Seattle, issued public invitations for bids for the sale and removal of 10 temporary war housing buildings, containing 144 dwelling units, and for the clearance of the real estate site (Fdg. I, R. 64-65).

A contract of sale of these buildings to Century Investment Corporation was executed. After August 21, 1953, Century purported to convey four of the buildings in the project without imposing the condition or obligation that they be removed from the site. The purported conveyance was in violation of paragraph 8 of the general conditions of the contract which provided that "Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party," citing Section 3737,

Revised Statutes, as amended, 41 U.S.C. sec. 15 (PR. 17). These buildings still remain on the site and are being used for private commercial dwelling purposes (Fdgs. X, XI; R. 70). Buildings 102 and 103 were purportedly acquired by defendant Virgil J. Pague from Century on August 21, 1953, and October 5, 1953, respectively. Thereafter Virgil J. Pague acquired an interest in the lots upon which buildings 102 and 103 were situated. Building 104 was purportedly acquired by defendants Arthur G. Barnett and wife and Donald F. Owens and wife on January 20, 1954, directly or indirectly from Century. On January 20, 1954, defendants Barnett, Owens and their wives jointly acquired an interest in the lots underlying building 104. Building 105 was purportedly acquired by defendants Edward R. Ester and wife in November 1953 from Carl W. Pague, who had acquired the same from Century (PR. 27). Thereafter, defendant Ester acquired an interest in the lots underlying building 105 (PR. 68-70, Fdg. XI).

None of the defendants possessed an interest in the lands, temporary use of which had been condemned, at the commencement of those proceedings. They acquired their respective interests after the date of the contract with Century for the sale and removal of the buildings. By the declaration of taking filed in the condemnation proceedings on June 15, 1945, the judgment entered therein on June 16, 1945, and by subsequent judgments fixing compensation entered in that action, the United States was granted the right to renew its exclusive use from year to year without the consent of the owners of the land, not to exceed

three years after the termination of the national emergency declared to exist by Presidential Proclamation of September 8, 1939 (54 Stat. 2643). The Government filed timely notice, yearly, of its intention to renew its exclusive use, extending to February 21, 1956 (PR. 70-71, Fdg. XII). The Government further extended its exclusive use for another yearly period to February 21, 1957, but subsequently terminated its use as of June 30, 1956 (Fdg. II, R. 65).

Near the expiration date for removal of the buildings and clearance of the sites, Century asked the Seattle Housing Authority for an extension of 60 days in which to remove the buildings. The Acting Director of the Seattle Housing Authority purported to extend the time to January 15, 1954.³ The District Court found that defendants had "full and complete knowledge" of the removal contract, and were "not innocent purchasers of same [the buildings] without knowledge and notice of the contract[']s expressed requirement that said buildings be removed from the site upon which they were situated * * *" (PR. 71-72, 77-79; ~~R~~dg. XIII, XIV; Concl. V). This Court similarly refers to the "full and complete knowledge" of the defendants (*Century Investment Corporation v. United States*, 250 F. 2d 139, 141 (C.A. 9, 1957),

³ While the Seattle Housing Authority purported to extend the time for performance, the District Court concluded that "there never was any general agency from the plaintiff [United States] to said organization [Housing Authority of the City of Seattle] or to Mr. Michaelson with power broad enough to generally authorize said organization or Mr. Michaelson to waive any of the terms and conditions of said contract" (PR. 75, Concl. V).

cert. den. 365 U.S. 950 *sub nom. Ester, et al. v. United States*).

The buildings not having be removed, the present action was instituted and relief both of a specific nature and in the form of damages was sought (PR. 8-10). After a trial, an oral decision was given by the District Court in favor of the United States, concluding that it was entitled to the specific and other relief sought. On October 20, 1955, findings of fact and conclusions of law were entered (PR. 62-81). The District Court referred the case to a special master to determine the amount of damages. After the master's report was received, the court abrogated its earlier position and declined to order specific performance of the contract of removal and site clearance. The reasons stated for this action were (1) that the estate claimed by the United States would expire July 1, 1956, which would be only a little more than two months from the date of decision; (2) that the United States had no present intention of extending the time; and (3) that the defendants "would have the right of exclusive possession of said lands and the right to move said buildings back on said lands * * *" (PR. 108-109, Suppl. F'dg. III). Rather than ordering such removal for a short period, the court determined to award damages.

This Court reversed the judgment as to defendants on the ground that the theory upon which the District Court awarded damages was invalid. It agreed, however, with the United States that certain other theories were within the scope of the pleadings and

might sustain an award of damages. The District Court was authorized to determine this possible liability “either by construing the findings in the record or by proceeding to another trial, as may be thought proper.” *Century Investment Corporation v. United States*, 250 F. 2d 139, 144 (C.A. 9, 1957). A petition by the defendants for a writ of certiorari was denied *sub nom. Ester, et al. v. United States*, 356 U.S. 950.

Thereafter motions for summary judgment were filed by all of the defendants (R. 3-18). The United States opposed those motions and invited attention to the fact that an amount which “equals or exceeds the amount of rents and taxes not previously paid by the United States of America for the exclusive right of possession to the lands condemned in Cause No. 1143 [the condemnation proceedings]” had been deposited with the Clerk of the Court (R. 21).⁴ The District Court ruled that the tender of the unpaid taxes was “too long delayed and is not a valid tender and has no effect so far as concerns effective renewal of the easement of the government which is involved in this case” (R. 115). At first the District Court denied all of the motions for summary judgment (R. 80). Later it granted the motions for summary judg-

⁴ While reference is there made to “rents” as well as “taxes”, rentals had regularly been paid or deposited in the registry of the court. As reflected in the instant record taxes were paid on some but not all of the lands involved for the reasons that some of the land was exempt from taxation, the amount of the taxes as to some of the land was not known and because of noncompliance by the defendants with the administrative procedures established to pay the taxes in an orderly manner as they were lawfully levied and assessed (e.g., R. 25-26, 111-116, 135-136). A discussion of this matter appears *infra*, pp. 14-19.

ment as to the individual defendants (R. 22-23, 41, 124, 128).⁵ In doing so the District Court noted that such summary judgment of dismissal "is most reluctantly entered" but was done so in obedience to that court's reading of the orders of this Court in connection with the earlier appeal (R. 128). The District Court noted that at the previous trial it had allowed recovery against all of the defendants upon what appeared to it to be a correct theory of the law and the District Court repeatedly noted that its present position is solely because of the ruling of this Court, which the District Court believed to be erroneous but none the less respected and would follow (R. 100-102, 120, 125, 128, 130; cf. R. 118-119, 129).

A motion by the United States for rehearing and reconsideration with respect to the summary dismissal of the individuals (R. 24-39) was denied by the District Court on August 22, 1958 (R. 47-48). Thereafter hearings were held covering both the matter of the Special Master's fee (R. 49-50) and the matter of damages to be awarded to the United States for the violation of its rights (R. 134-170). Various exceptions were filed by defendants to proposed findings of fact, conclusions of law and judgment (R. 50-60). Under date of September 29, 1958, the District Court issued findings of fact and conclusions of law (R. 63-75) and two orders, namely, (1) an order fixing com-

⁵ Attention is invited to the fact that a portion of the transcript of proceedings held July 10-11, 1958, appearing on pages 41-42 of the printed record, is also included at pages 123-124 of the printed record in this case where more comprehensive excerpts from those proceedings are printed.

pensation and expenses of the Special Master and charging responsibility therefor (R. 61-63) and (2) a judgment which, *inter alia*, finally dismissed the individual defendants and awarded the United States damages against the Century Investment Corporation in the sum of \$15,000 (R. 75-77). The record reflects the insolvency of that corporation (R. 127).

Notices of appeal were filed by all parties (R. 78-86). The statements of points on appeal filed by the various parties appear in the printed record at pages 88-91. It was stipulated that the printed transcript of the record on the previous appeal (No. 15219) may be considered by the Court in the instant case (R. 172-173).

SUMMARY OF ARGUMENT

The United States proved a right to substantial damages against the individual defendants on both of the grounds indicated by this Court, i.e., implied contract and trespass. Despite its own clearly manifested conviction that all of the defendants, individual and corporate, were responsible for damages to the United States, the District Court dismissed the individual defendants from the proceedings, expressing the view that it was compelled to do so by the rulings of this Court on the earlier appeal in this case. The District Court clearly erred in doing so. The opinion and mandate of this Court did not require the dismissal of the individual defendants and the resulting failure of justice in this case.

ARGUMENT

I. The Government proved a right to substantial damages against the individual defendants

When it remanded this case, this Court held that the United States could not recover rents the individual defendants had received as a measure of liability for damages in lieu of specific performance on the ground that obligations of the corporation in contract did not extend to the individuals. It expressly left open the possibility of recovery under trespass and implied contract. We submit that a basis for recovery was shown under each of these theories.

A. A right to substantial recovery under implied contract was established

Upon the remand the District Court has recognized the full knowledge of all of the individual defendants of the removal requirements and the fact that "it was wholly inequitable and unconscionable for them to disregard the rights of the United States under the Century contract" (R. 100-102; see also R. 125). This Court itself has recognized that, as the earlier findings recited, the individuals were not innocent purchasers but acted with full knowledge of the Century contract (250 F. 2d at p. 139; PR. 64-65, 71-73, 77-78).

In regard to the equities, the fact is material that this was not a mere contractual provision but represented execution of an important policy of Congress, with whose laws the individuals were, of course, charged with knowledge. The legislative history of

the Act here involved (Lanham Act, Secs. 313, 604, 54 Stat. 1125, as amended, 64 Stat. 48, 64, 72-73) makes clear the policy of Congress to avoid any charge against the Federal Government that by leaving temporary housing projects around the country it created slums, presented personal injury hazards, depressed land values, etc. For example, in discussing the bill in which Sec. 313 was offered as an amendment, Mr. Sasser stated (89 Cong. Rec. 6888):

Some of this temporary housing, as many of us know, is located in sections where it is not particularly wanted, but the communities accepted it in furtherance of the war effort. It is substandard, not in keeping with surrounding properties; and if, after the war, it is not taken down, it will become more substandard, detrimental to values of surrounding properties, and in many instances might, as was the case after the last war, become ghost cities or possibly be sold to bargain-hunting private investors and rented as substandard properties out of keeping with the surrounding homes or carried on permanently as a Government-owned housing proposition which is contrary to the intent of the Congress. * * *

See also: 89 Cong. Rec. 6873, 6886; 96 Cong. Rec. 3159, 3216; *Shanks Village Residents Association v. Cole*, 219 F. 2d 28, 30 (C.A. D.C. 1955), cert. den. 349 U.S. 906, where the court stated with reference to this same statute: "Throughout consideration of this bill Congress evinced a strong purpose to eliminate this temporary housing and to get the Government out of the business of maintaining and renting it"; and

United States v. Certain Parcels of Land in Cheyenne, 141 F. Supp. 300, 304 (D. Wyo. 1956), where the court stated with reference to temporary housing: “* * * it was the announced policy of Congress with respect to such housing that it should be removed or otherwise disposed of as promptly as practicable and in the public interest, 42 U.S.C.A. secs. 1524, 1541, 1584 * * *.”

The worst fears of the Congress have been permitted by the District Court to occur in the instant case. Thus the record discloses (R. 37):

The danger apprehended by the Congress if it permitted the continued use of these substandard structures after the termination of the emergency has proven in this case to have been a very real one. Deponent [Assistant United States Attorney Joseph C. McKinnon] viewed the buildings in question on July 20, 1958, and found a disturbing slum area of unkept shacks scattered with no apparent plan upon a weed-grown block in an industrial area with factories, warehouses, and open storage of rusty machinery.

See also R. 109-110, 112. As noted by the Government's trial counsel, the United States (R. 112)

* * * did everything it possibly could to get bare land, to live up to the intent of the congressional act that required that this substandard housing be removed, that the shacks be taken off of the landscape and the land restored to its original condition.⁶

⁶ It should be noted that because of the improper actions of the defendants themselves a cloudy legal situation had been created which caused it to be imprudent for the Government

The net rentals received by the defendants are, we submit, a clearly appropriate measure of the amount of unjust enrichment that has occurred by the failure to observe the congressional-imposed limitations. The District Court agreed but felt it was bound to hold otherwise by this Court's decision (R. 100-102, 125). Its mistake was in thinking that any evidence concerning rental income received by defendants could not be used for any purpose (R. 129-130). This Court did not so hold. It merely held that those rentals could not measure, as against individual defendants, the monetary value of a substitute for specific performance. They correctly measured, we submit, the unjust enrichment giving rise to an implied contract.

B. A right to substantial recovery under trespass law was established

In its first ruling the District Court had held that the defendants were not trespassers because the United States had not paid taxes which were a part of the just compensation owing for the temporary taking. This Court disagreed, saying (250 F. 2d at p. 144):

It may be that the government was not prompt in completing its payments for previous months or years. But, if such payments were ultimately made, the government's exclu-

to undertake to exercise the "self-help" provision of the contract (Par. 6 of General Conditions, PR 16). In the circumstances which the defendants had created, reliance upon the courts was clearly appropriate, though, to date, such reliance has proved singularly ineffective. This matter is discussed in more detail in the brief for the United States as appellee on the prior appeal (No. 15219), pp. 24-25.

sive right of possession during such period, at least as against these appellants [defendants], would seem to be established.

Here, the District Court simply refused to follow the mandate of this Court and persisted in its previous holding (R. 73, fn.) that trespass was “* * * decided against plaintiff and in favor of defendant at the first trial and no evidence in the record at this time justifies a different result.” This was not a question of evidence but of a mistake of law corrected by this Court.

The correctness of this Court’s ruling is clear from the fact that there were good and sufficient reasons why the taxes had not been paid on the land underlying the buildings here involved—indeed, reasons which made such payments impossible. (See offer of proof in the form of an affidavit by Assistant United States Attorney Joseph C. McKinnon (R. 25–39), which offer of proof the District Court denied (R. 140), and R. 111–114, 135.) But even if there had not been such reasons, nonpayment of the taxes had no legal effect on the exclusive right of possession condemned by the United States. The full faith and credit of the United States is, and has long been considered, pledged for the payment of such taxes or any other elements of just compensation for property acquired by the United States under its eminent domain power. Thus, it is established law that the Government may “take” property in the exercise of the power of eminent domain without formal condemnation proceedings even being instituted, and that in

such event the landowner's remedy is a suit under the so-called Tucker Act on the theory of implied contract, the recovery being the same as though a condemnation proceeding had been filed. *Campbell v. United States*, 266 U.S. 368, 370-371 (1924); *Hurley v. Kincaid*, 285 U.S. 95, 103-105 (1932); *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, 21-23 (1940). Payment of the taxes when determined and presented for payment was assured.

The fact that nonpayment of the taxes at the time rentals were paid would have no legal effect upon the exclusive right of possession of the United States is further pointed up by the fact that a declaration of taking was filed by the United States in acquiring its interests in the land involved in the condemnation proceedings, Civil No. 1143. And with the filing of that declaration of taking and deposit of estimated compensation which accompanied it, under the Declaration of Taking Act (40 U.S.C. secs. 258a-e) title to the estate acquired vested in the United States. *United States v. Dow*, 357 U.S. 17 (1958). Thereafter the District Court could only determine just compensation; it had no jurisdiction to alter the fact that title had vested. E.g., *United States v. Hayes*, 172 F. 2d 677, 679 (C.A. 9, 1949); *United States v. Carey*, 143 F. 2d 445, 450 (C.A. 9, 1944); *United States v. 44.00 Acres of Land, Etc.*, 234 F. 2d 410, 415 (C.A. 2, 1956), cert. den. 352 U.S. 916.⁷ While

⁷ A judgment entered on September 28, 1945, in the condemnation action expressly provided:

3. That the United States of America may exercise its

under the Declaration of Taking Act the court had power to make orders with respect to taxes, among other things (*Catlin v. United States*, 324 U.S. 229, 239 (1945)), as demonstrated by the cases cited above, that would not and could not change the legal title or right which had vested in the United States. Thus, whether or not the taxes were paid with the rentals, or much later under the orderly established procedures for such payment, did not change the fact that the United States had the exclusive right of possession of the land during the pertinent time here involved. Compare the erroneous ruling by the District Court that the deposit on July 8, 1958, of an amount which "equals or exceeds the amount of rents and taxes not previously paid by the United States of America for the exclusive right of possession to the lands condemned in Cause No. 1143" (R. 21) came too late⁸ (R. 114-116).

It should be noted also that the established law is properly reflected in statements made to the District Court by government counsel. Thus he stated, *inter alia* (R. 112-113):

In any event, we have under well established condemnation law full possession of all of the land as soon as we get possession from the Court. Here we had judgments that required

right to renew the estate taken in said land from year to year as provided in the declaration of taking without notice to said respondent, provided that no renewal shall, without the consent of said respondent, extend beyond three years after the termination of the existing national emergency. * * *

⁸ See fn. 4, *supra*, p. 8.

us to pay it. The payment was not and is not a condition of our legal possession, because Congress by passing the Tucker Act a great many years ago agreed in advance to pay reasonable compensation, and these defendants under the Tucker Act could have come in to this Court at any time and sued the United States for the amount of the taxes, if the United States was wrongfully withholding that amount. As I pointed out, we weren't withholding it. We didn't even know what the amount of the taxes was.

I might say as something of an aside, there's no one in the United States that yet knows what the taxes are. Probably the amount we have deposited is several times too large, but every possible contingency was included so that there could be no further technical claim that we hadn't paid it. There will have to be proof by these defendants before they can withdraw any of that amount.

An able, though brief, discussion of cases then follows (R. 113-114).

There are other reasons why the matter of the taxes does not warrant the effect given to it by the District Court. The tax matter is but a collateral attack on the condemnation proceeding, a separate action. Neither in the instant case nor in the condemnation proceeding—which would be the only appropriate place for such an order—has the District Court ruled that the Government's estate terminated earlier than June 30, 1956, by virtue of any failure to deposit in advance funds to cover taxes. We submit that in view of established law the District Court is in error

both (1) in using the tax matter as a reason for construing the opinion of this Court as compelling the dismissal of the individual defendants; and (2) in its prior conclusion that the tax matter furnishes justification for ultimately denying the specific relief to which it had found that the United States was entitled.

We further invite the attention of this Court to the fact that from the affidavit of trial counsel, which was made as an offer of proof (*supra*, p. 15), it is clear that some of the land during the pertinent period was exempt from any taxation; that full and complete just compensation, under any interpretation of the tax matter, was paid for some of the property involved; that it is clear that taxes were paid on parts of the property involved for the years to and including 1956 and that taxes were paid on part of the land for part of the years; and that defendants in this action not only have not complied with the conditions precedent to the reimbursement to them of the amounts of the taxes but that defendants Pague, Barnett and Owens have in fact advised a representative of the office of the United States Attorney that they did not wish to receive rentals for the land owned by them until after the termination of the condemnation case (R. 25-38; see also R. 111-114, 116-117, 135-138).

The short of the matter is that the United States was entitled to exclusive possession as against the defendants. Thus occupation of federal property was plainly a trespass. Just as clearly the rents the defendants collected were some evidence of rental value and, absent other evidence, made, it least, a

prima facie showing of trespass damage. Other evidence adduced at the retrial supported the Court's findings of substantial damage to the Government as follows:

The District Court found expressly (R. 70):

XI

That buildings 102, 103, 104 and 105 still remain on the site and are still occupied as dwelling units at that place, contrary to the provisions of the contract and the intent of the parties to the contract, although plaintiff, in consideration of defendant Century Investment Corporation's promise to remove the buildings from the site and clear the land upon which the buildings had stood, sold those buildings to that defendant for a total sum of \$8,694.00 when they had a total on-site value of \$132,636.58.

This finding alone indicates damages to the United States of roughly \$124,000. The District Court goes on to find (R. 70-72):

XII

That prior to June 1, 1953, plaintiff caused the dwelling units in the said buildings 102 through 105 to be vacated although they were then substantially fully rented at a profit to the plaintiff, and if plaintiff had not caused the buildings to be vacated in contemplation of a contract for their removal, the plaintiff could have continued to rent the dwelling units in Buildings 102 through 105 from June 1, 1953 through June 30, 1956 at a profit of not less than \$750.00 per month; there being 54 such

dwelling units in such buildings which could have been kept approximately 95 percent rented during such period of time at a monthly rental of \$42.00 each for each unit, with the expense of operating each unit totaling not more than \$27.00 per month.

* * * * *

XIV

That from September 1, 1953 to November 16, 1955, Virgil J. Pague's net profit from the rental of apartments in Buildings 102 and 103, after deduction for depreciation, land rental, and all operating expenses, was \$6,765.13; which profitable operation continued from November 16, 1955 through June 30, 1956, although the exact amount of profit for the latter period has not been computed.

XV

That defendant marital communities of Barnett and Owens operated Building 104 from June 1, 1954 to November 16, 1955 with a net profit of \$5,282.81, after deduction of all expenses including depreciation and continued similar profitable operation during the period November 16, 1955 through June 30, 1956, although the exact amount of the profits for the latter prior [sic, period] has not been computed.

XVI

That the marital community of Edward R. Ester and wife operated Building 105 from May 1, 1954 to November 16, 1955 at a net profit of \$3,764.59, after deductions for all expenses including depreciation, and continued similar

profitable operation from November 16, 1955 through June 30, 1956, although the exact amount of profit for the latter period has not been computed.

In view of these findings it necessarily follows that the District Court's dismissal rested only on its theory that there had been no trespass.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be reversed and the case remanded for the determination of damages in favor of the United States and against the individual defendants.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

CHARLES P. MORIARTY,
United States Attorney,
Seattle, Wash.

JOSEPH. C. MCKINNON,
Assistant United States Attorney,
Seattle, Wash.

ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,

Department of Justice, Washington 25, D.C.

SEPTEMBER 1959.

United States Court of Appeals
For the Ninth Circuit

CENTURY INVESTMENT CORPORATION, *Appellant*,

vs.

UNITED STATES OF AMERICA, and DON S. GRIFFITH,
Special Master, *Appellees*.

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BRIEF FOR JOINT APPELLANTS-APPELLEES
EDWARD R. ESTER, ARTHUR G. BARNETT and
DONALD F. OWENS

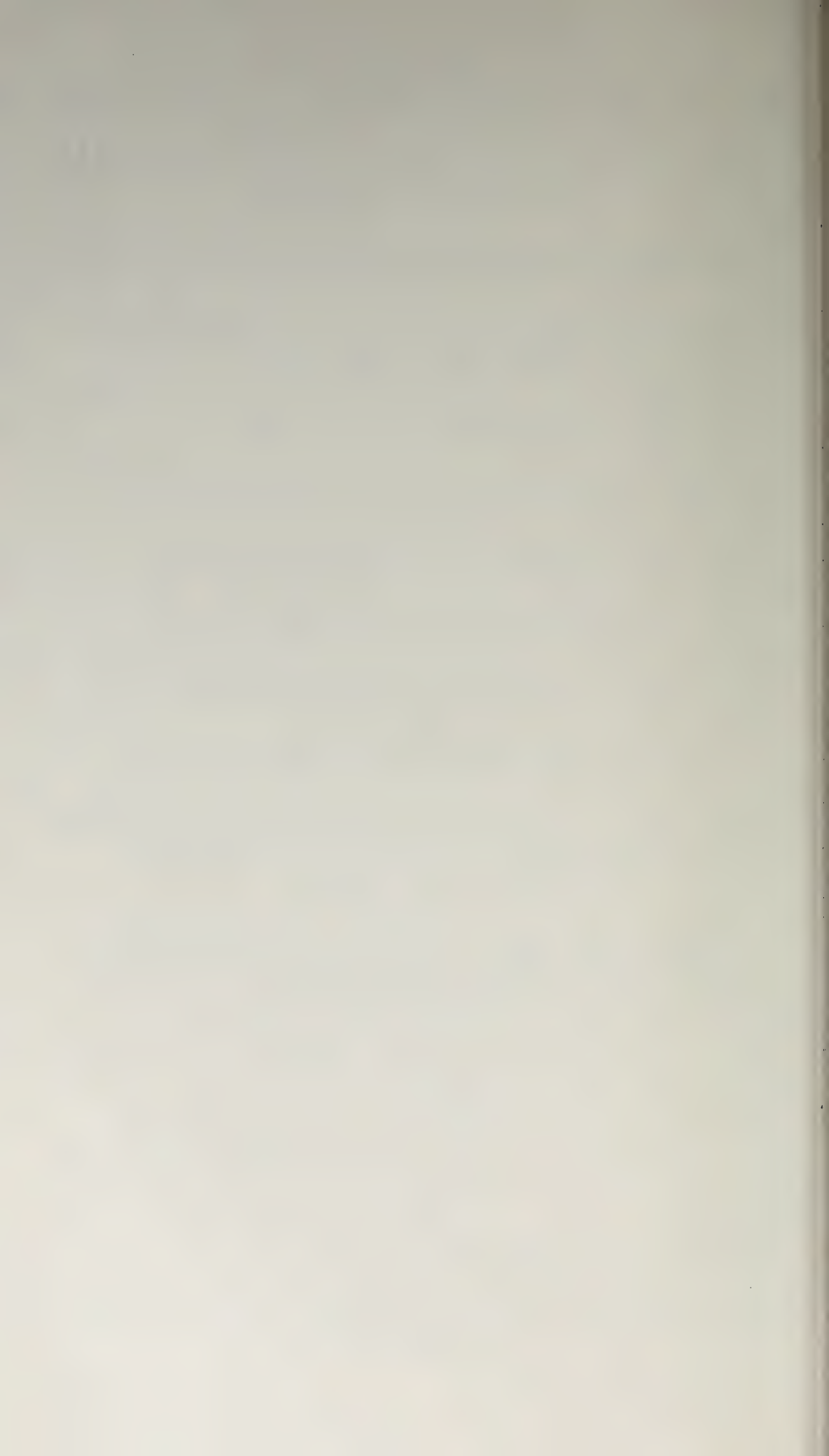
ARTHUR G. BARNETT

McMICKEN, RUPP & SCHWEPPE

*Attorneys for Edward R. Ester,
Arthur G. Barnett and Donald
F. Owens, Appellants-Appellees.*

1304 Northern Life Tower
Seattle 1, Washington





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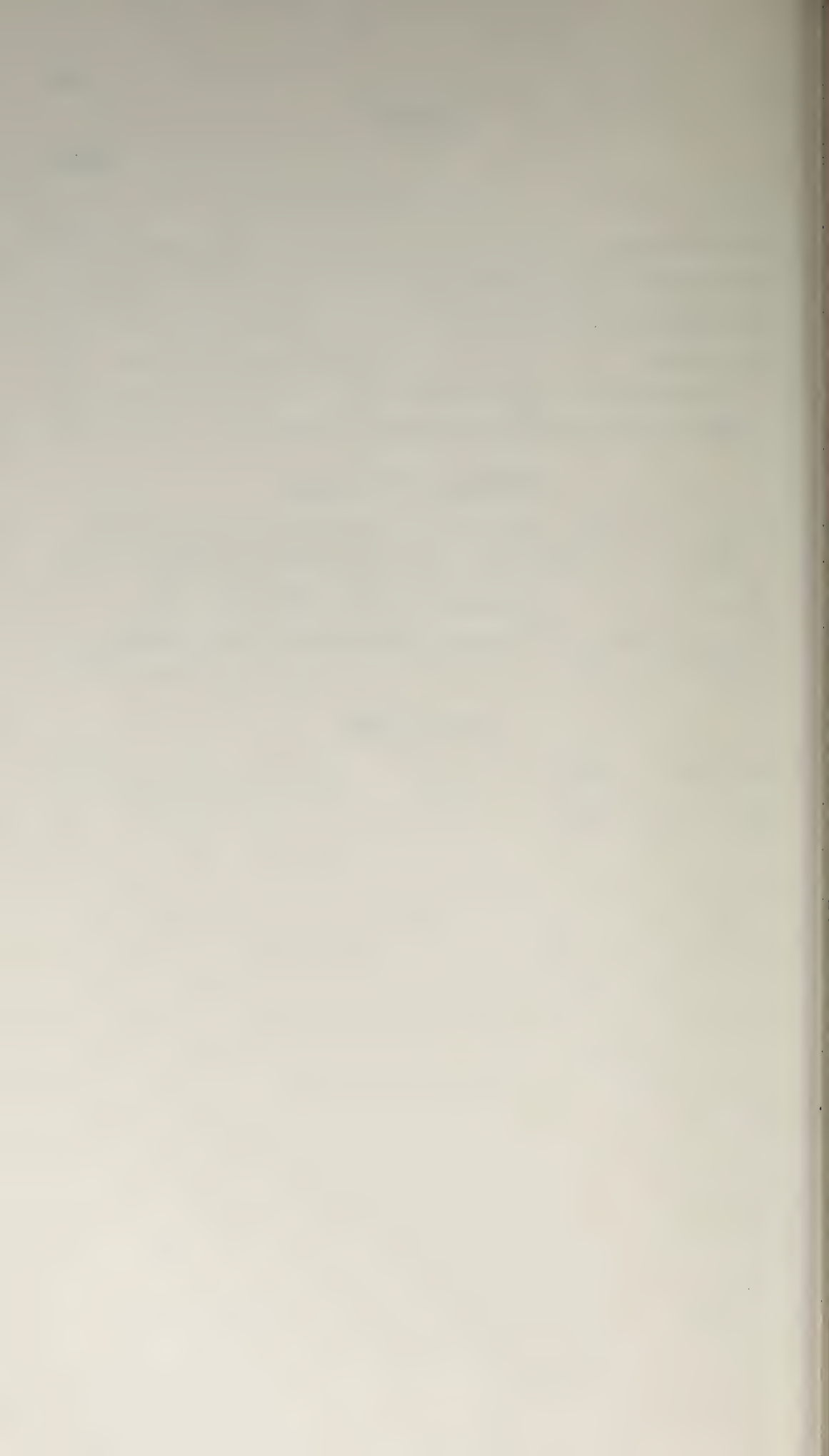
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DONALD F. OWENS

OPINION BELOW

The District Court, pursuant to the remand of this Court in 250 F.2d 139, 144,¹ construed its supplemental findings and entered and filed an order granting summary judgment on the 11th day of July, 1958, dismiss-

¹It is stipulated that the record in the former appeal, Cause No. 15219 may be used herein (R. 172).

ing the action as to Barnett, Owens, Ester and Pague, subject to a reservation to determine liability for payment of the fee of a Special Master (R. 22).

Also pursuant to the remand the District Court proceeded with a new trial on the issue of damages only as to the defendant Century Investment Corporation, and entered a judgment against it on the 29th day of September, 1958, in the sum of Fifteen Thousand Dollars (\$15,000.00) (R. 75-77). Barnett, Owens and Ester were not parties in the new trial (R. 49-50, 73*, 138). However, on the same day, as a result of a separate hearing, the court entered an order entitled "Order Fixing Compensation and Expenses of Special Master And Charging Responsibility Therefor" (R. 61). In this Order the defendants, Barnett, Owens, Ester, Pague and Century Investment Corporation were charged three-fourths ($\frac{3}{4}$) of a Twenty-five Hundred Dollar (\$2500.00) fee, together with Eighty-three Dollars (\$83.00) for expenses, amounting to Nineteen Hundred Thirty-seven and $\frac{25}{100}$ (\$1937.25). The obligation was made joint and several; " * * * and if the defendants do not pay the share * * * charged to them within sixty (60) days from date hereof, the Master may have execution against any or all of them for the same" (R. 61-63). The Government was ordered to pay one-fourth ($\frac{1}{4}$) of the fee and expenses in the sum of Six Hundred Forty-five and $\frac{75}{100}$ Dollars (\$645.75). Century appeals from the Fifteen Thousand Dollar (\$15,000.00) judgment and Century and Pague both appeal from the order charging them with a portion of the Master's fee and expenses; and both filed their notices of appeal on November 20, 1958 (R. 78-79).

Execution on the Master's fee was thereby suspended as to Pague and Century. Barnett, Owens and Ester gave notice of appeal on November 28, 1958² (R. 84-85).

JURISDICTION

This case was heard on a former appeal, 250 F.2d 139. It was held that the judgments for damages and for a Master's compensation were reversed and the cause was remanded for the trial court to construe its supplemental findings as to Barnett, Owens and Ester, 250 F.2d 139, 144.

This is a joint appeal by Barnett, Owens and Ester from an order charging them with a portion of the the compensation and expenses of a Special Master entered and filed September 29, 1958, in the District Court of the Western District of Washington, Northern Division (R. 61). The jurisdiction was invoked by the United States under 28 U.S.C. Sec. 1345 (R. 3, Cause No. 15219). The jurisdiction of this Court is invoked under 28 U.S.C. 1291, and under the remand in 250 F.2d 139.³

STATEMENT OF THE CASE

The statement of the case is based on a review of the remand by this Court as contained in its opinion in 250 F.2d 139. This Court stated:

² If Barnett, Owens and Ester had not appealed they would have been subject to execution for the entire amount of the Master's fee and expenses.

³ The Government appeals (R. 81) from the judgment awarding it Fifteen Thousand Dollars (\$15,000.00) except that part respecting the compensation and expenses of the Special Master (R. 75-77); (2) from the portion of the order granting summary judgment in favor of Barnett, Owens, Ester and Pague (R.22); (3) and from the order denying the motion of the Government for rehearing and reconsideration of the motions for summary judgment (R. 47).

“It is nevertheless true that the complaint is broad enough to sanction damages on the theory of trespass or an implied contract to pay the reasonable rental value of the lands. * * *

“This would not be true if the Government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. Barnett, Owens and Ester argue that the trial court so held in its supplemental findings of fact.

“We are not certain that this is the purport of the supplemental findings relative to exclusive right of possession. . . .”

“Upon remand, the trial court may determine the question of liability on the theory of trespass of implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred for monetary damages sustained by the Government.” 250 F.2d 139, 143-144

This remand “* * * for further proceedings not inconsistent with this opinion” has already been construed by this Court in this cause now before it in the following language:

“Upon a former appeal, all the issues were presented to this Court. It was held that the judgment of the District Court was reversed and remanded for a new trial as to Century on the issue of damages only arising by breach of contract. As to Barnett, Owens and Ester, the following excerpt from the opinion shows the status: . . .” (then the Court

quotes the paragraph from the opinion set forth above beginning: "Upon remand . . .").

" * * * In view of the former opinion and mandate of this Court, the issues on this appeal appear to be narrowly limited."⁴

SPECIFICATION OF ERRORS

The District Court erred in ordering Barnett, Owens and Ester to pay any portion of the Master's compensation and expenses for the following reasons:

(1) The District Court was limited under the remand to dismissing Barnett, Owens and Ester when it construed its supplemental findings and reaffirmed its supplemental finding that the Government did not have the exclusive right of possession of the land during any of the time when Barnett, Owen & Ester owned the houses. The action of the trial court thus removed the stated uncertainty of the Appellate Court, 250 F.2d 139, 143. It follows that had the Appellate Court understood the intent of the trial court, Barnett, Owens and Ester would have been ordered dismissed.

(2) The issue on the Master was *res judicata* as to Barnett, Owens & Ester, having been presented as an appeal issue and ruled upon by this Appellate Court in the former hearing. Further, no new evidence was received on any new theory to support action by the Court on the Master. This Appellate Court had held that the theory of damages as to Barnett, Owens and Ester was erroneous. The old reference to the Master was also erroneous. There was no new reference.

⁴The Court denied a motion by Barnett, Owens and Ester to dismiss a portion of the appeal of the Government (Order March 30, 1959).

(3) It is not substantial justice to force Barnett, Owens and Ester to re-argue an issue previously fully presented to this Court in the former appeal, especially in view of the fact that Barnett, Owens and Ester attempted to avoid remand by fully and correctly arguing the clear intent of the supplemental findings to this Court, and by petition for rehearing to this Court. Had this Court in the petition for rehearing recognized the clear intent of the trial court as now construed after remand, it is clear that the case would have been ended as to Barnett, Owens and Ester.

(4) The trial court having already dismissed the individual defendants so that they were not parties to nor present at the trial on September 15, 1958 (R. 49-50, 73*, 138), it was error to render a judgment involving Barnett, Owens and Ester inasmuch as no findings of fact could be made to support a judgment against them.

ARGUMENT

Specification of Error No. 1

The Appellate Court remanded a narrow issue, namely, for the trial court to construe its supplemental findings, and the trial court was advised of the Appellate Court's uncertainty regarding the meaning of said supplemental finding. The trial court was further advised that if the meaning was as contended for by appellates, Barnett, Owens and Ester, that then the possible basis of liability suggested by the Appellate Court " * * * would not be true. * * * " 250 F.2d 139, 143.

Surely the Appellate Court would have made complete its dismissal of the action as to Barnett, Owens

and Ester consistent with its reversal of the judgments if it had undertood the supplemental findings. The trial court was given the authority to complete the decision of the Circuit Court if the trial court felt bound by the intent of the findings. The trial court was also given discretion to proceed to another trial, but the trial court felt bound by its supplemental findings. It follows that the trial court was not authorized to reopen any other issues in the case as to Barnett, Owens and Ester. Having construed its supplemental findings, the court upon motion for summary judgment of the individual defendants, entered its order granting summary judgment (R. 22).

“The rule is firmly established that the decision of an Appellate Court on appeal or writ of error is controlling upon the court below after the case has been remanded, and is equally controlling upon a second appeal or writ of error in the same case. * * * The rule itself has been iterated and reiterated by the Supreme Court and by this Court. * * * ” *City of Seattle v. Puget Sound Power & Light Co.*, 9th C.C., 15 Fed. 794, 795, certiorari den. 269 U.S. 565. (The Court then considered defenses not foreclosed by the former decision.)

“The rule applicable to the case, as now presented is stated in the opinion of the Supreme Court in *Roberts v. Cooper*, 20 How. 481, 15 L.ed. 969, as follows:

“ ‘It has been settled by the decisions of this Court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which

were before the Court on the first writ of error can be heard or examined upon the second.'

"This rule has been consistently observed by this Court. *Montana Mining Co. v. St. Louis, etc., Co.*, 147 Fed. 903, 78 C.C.A. 33; *San Pedro, L.A. and S.L.R.G. v. Thomas*, 187 Fed. 790, 109 C.C.A. 638.

"After rendering its opinion on the former hearing of the case, this Court considered and denied an application for a rehearing, and now the Court can do no less than to declare the litigation terminated, subject to any right of review which the Government may have to apply for a review of the case by the Supreme Court." *United States v. Axman* (9th C.C.), 193 Fed. 644.

It is indeed regrettable that the intent of the supplemental finding was not clear enough—but it is now: some of it in the handwriting of the trial court (R. 73*) and from numerous other portions of the record (R. 41-47; R. 128-133, 124).

Specification of Errors Nos. 2, 3 and 4

The objections of Barnett, Owens and Ester to the order (R. 61) on the Master's compensation are fully stated (R. 58-60).

It is strange and unjust that Barnett Owens and Ester must again meet an issue which was disposed of on the former appeal. There it was held that Barnett, Owens and Ester were not privy to the contract, and therefore they were no more amenable to specific performance, and hence to an equitable substitute for specific performance than they were to damages for breach of contract. This Court also held that the judgment against Barnett, Owens and Ester could not be sus-

tained on the theory of breach of contract because of error in the measure of damages which was applied, 250 F.2d. 139, 142-143. A considerable portion of the prior record and the briefs on the former appeal by Barnett, Owens and Ester were devoted to showing that the Special Master's accounting was clearly erroneous. Are Barnett, Owens and Ester now compelled to restate their arguments on an issue which was fully settled by this Court and an issue which therefore became *res judicata*? We respectfully refer the Court to the brief of joint appellants, Barnett, Owens and Ester, in the prior numbered Cause No. 15219, commencing on page 39, entitled Argument on Specification of Error No. 3, and to the record on the said prior numbered cause (R. 82-91; 97-107 and exhibits), all designated and prepared at considerable expense to these joint appellants. In its answering brief the United States did not meet the errors and issues therein raised concerning the Master's report, but instead used about 40 lines on two pages to state that this Court would not conduct a trial *de novo* and that the findings of the Special Master and the Court "were well-nigh conclusive." (Br. U.S., 15219, pages 30-32). Barnett, Owens and Ester answered these contentions in their Reply Brief in said Cause, pages 17-21. However, some recapitulation of argument regarding the Master might be in order. The United States is responsible for the error of the Court in requesting an accounting on the wrong theory of damages, by its insistence therefor and prayer therefor in Item 4 of its Complaint (R. 9, 15219). Since the

Government had failed to prove its right to exclusive possession of the lands, no rents or other compensation was due and, therefore, it had no right to an accounting. The accounting in the absence of this proof was absolutely unnecessary, and the reference was therefore an error in law. The Special Master's work was poor. His first reports were filed without at the same time the filing of his records and data. This would have deprived the joint appellants of a record on appeal. This forced Barnett, Owens and Ester to move to strike to preserve their appeal. The motions were granted. The Master capitalized maintenance and repair items as to Barnett, Owens and Ester while allowing similar items to be deducted by Pague as expenses against current income for Pague. The Master was inconsistent and guilty of unjustified discriminations. He allowed Pague a 100% deduction for cost of windows, while allowing Ester only 20% on similar glass items; and the same for electrical repairs. In the brief of these appellants in the former appeal, it is stated that the Master showed further discriminations on the boiler room motor repairs, lumber and window shades, refrigerator repair, painting and plumbing items, and garbage cans. We there concluded "if the cost of Pague's garbage cans may be deducted 100% in one year why should the other litigants have to wait 20 years to recover the cost of their garbage cans" (Br. Joint Appellants, Barnett, Owens and Ester, Cause 15219, p. 41).

No new evidence was received upon which to justify

a “re-reference” to a Master. No new evidence could have been received in evidence under the law of the case as to Barnett, Owens and Ester as settled by the remand. Instead, the court determined “ * * * the matter upon the record already made * * * ” (R. 134), over objections by Barnett, Owens and Ester (R. 133).⁵

After entering its order granting summary judgment (R. 22), and after entering its order allowing the Master compensation and expenses (R. 61), the Court was persuaded by the Government to sign a judgment (R. 75) based on findings of fact (R. 63), after a new trial as to Century only, which said judgment attempted to involve Barnett, Owens, and Ester *although they were not present at the trial and had already been dismissed* (R. 138, next to last paragraph statement by the Court; R. 49,⁶ R. 73*).

This development compelled Barnett, Owens and Ester to file full and complete objections to the proposed findings of fact and conclusions of law (R. 55-59). The findings of fact as to Barnett, Owens and Ester therefore are not supported by any evidence pertaining to Barnett, Owens and Ester. Consequently the findings entered after the new trial as to Century do

⁵In fact the Court reinstated the exact amount in dollars and cents of the reversed judgment: to-wit: Nineteen Hundred Thirty-seven and 25/100 Dollars (\$1937.25) (R. 116, Item 2-117 in former Cause No. 15219; R. 62 in this cause). It may be noted from said record in former cause No. 15219 that the Government was ordered to pay one quarter of the fee and expenses in the sum of Six Hundred Forty-five and 75/100 Dollars (\$645.75). It did not appeal and to this date has not paid the Master.

⁶“The Court: * * * my understanding is that the defendants, all except this defendant Century, have been formally dismissed by an order entered within the last four or five weeks” (R. 138).

not support any part of the judgment erroneously mentioning Barnett, Owens and Ester.

Respectfully submitted,


ARTHUR G. BARNETT

McMICKEN, RUPP & SCHWEPPE

*Attorneys for Edward R. Ester,
Arthur G. Barnett and Donald
F. Owens, Appellants-Appellees.*

No. 16360

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BRIEF OF APPELLANTS CENTURY INVESTMENT
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LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,
Attorneys for Appellants Century
Investment Corporation and
Virgil J. Pague

Office and Post Office Address:
400 Hoge Building, Seattle 4, Washington

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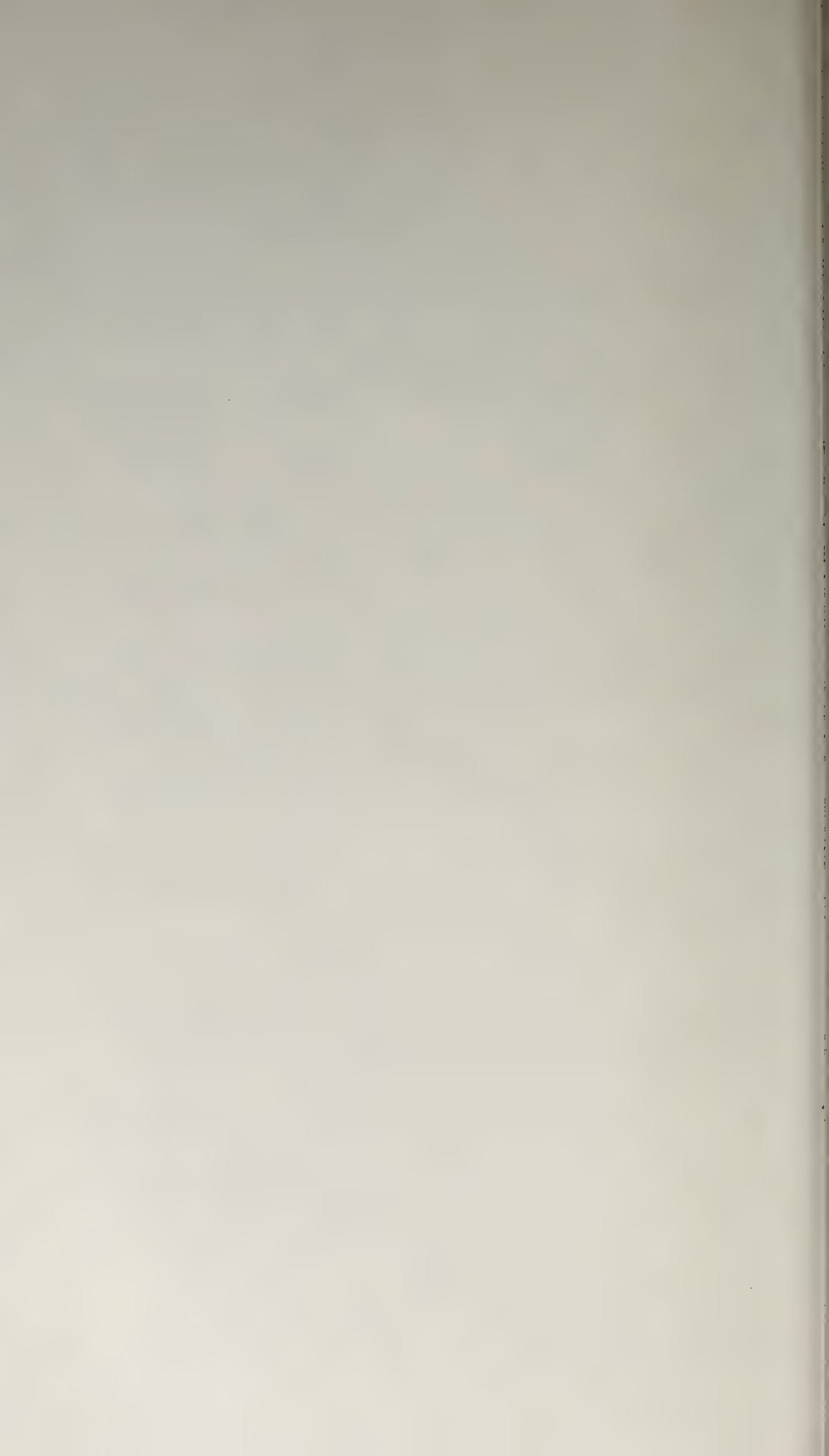
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and LYLE L. IVERSEN,

Attorneys for Appellants Century
Investment Corporation and
Virgil J. Pague

Office and Post Office Address:
400 Hoge Building, Seattle 4, Washington



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NORTHERN DIVISION

HON. JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS CENTURY INVESTMENT
CORPORATION AND VIRGIL J. PAGUE

I.
JURISDICTION

This is a second appeal from an action commenced in the United States District Court for the Western District of Washington, Northern Division, on behalf of the United States by the United States District Attorney. The action is based upon a contract

to which the United States is a party and according to the complaint jurisdiction is based upon Title 28, U. S. Code, Section 1345.

II.

STATEMENT OF THE CASE

This is an appeal from the final judgment entered upon a trial after remand of the cause heard in this court as No. 15219. The previous decision was rendered on October 30, 1957, and the opinion was amended by an order dated December 23, 1957. The previous opinion is reported in 250 F. (2d) 139.

With respect to appellant Century Investment Corporation, the result of the previous determination by this Court was that this Court reversed the trial court and remanded the cause for trial on the issue of *damages only* arising by reason of the corporation's breach of contract.

With respect to appellant Pague, the Court also reversed the lower court and remanded the cause for further proceedings similar to those indicated for other defendants as to whom this Court authorized the lower court to determine questions of liability, either by construing the findings in the record or by proceeding to another trial as might be thought proper.

After remand, each of these defendants moved for summary judgment of dismissal (Tr. 3, Tr. 7). The trial court granted the motion for summary judgment as to defendant Pague (Tr. 22), reserving only as to each defendant questions as to liability for the payment of a fee of a special master (Tr. 23). The motion of Century Investment Corporation for summary judgment was denied (Tr. 23) and the matter proceeded to trial on September 15, 1958

on the sole issue of damages due from Century Investment Corporation (Tr. 134). This trial resulted in the entry of a judgment against Century Investment Corporation in the sum of \$15,000.00 (Tr. 77). The court also entered its Order Fixing Compensation and Expenses for Special Master and Charging Responsibility Therefor (Tr. 61), by which fees of a special master in the sum of \$2,500.00 were allowed, together with \$83.00 costs, three fourths of which was charged jointly and severally against defendants Century Investment Corporation, Virgil J. Pague, Arthur G. Barnett and wife, Donald F. Owens and wife, and Edward R. Ester and wife. This appeal is from the judgment entered against Century Investment Corporation and the order for the special master's fee entered against Century Investment Corporation and Virgil J. Pague.

The facts, as found by the lower court, from the previous trial were not excepted to and appear on pages 62 to 74 of the transcript in the previous appeal docketed in this Court as 15219. That previous transcript has been incorporated in this record by stipulation (Tr. 172). For convenience in referring to it, we shall call it "Previous Transcript" (P. Tr.), as distinguished from the transcript on this appeal which we shall refer to as (Tr.). These material facts briefly are that Century Investment Corporation was the successful bidder for the purchase of ten buildings sold by Seattle Housing Authority for the Public Housing Administration (P. Tr. 74). These buildings stood upon land upon which the government had condemned a leasehold (P. Tr. 63). By the terms of the contract of sale to Century Investment Corporation the buildings were to be removed from site (P. Tr. 63). Century Investment Corporation sold four of the buildings to defendants

Pague, Barnett, Owens and Ester (P. Tr. 68). These individuals acquired the land underlying the buildings (P. Tr. 68). After remodeling them to conform to Seattle Building Requirements, they rented them for dwelling purposes and they have not been removed from the site. The government had failed to pay all the consideration required to keep its leasehold alive (P. Tr. 107, 108). After remand the trial court construed its previous findings (Tr. 42, 43) to hold that the government had not established any right to possession of the land at any time material hereto (Tr. 43, 46).

The first trial resulted in a judgment for damages in various amounts entered against Century Investment Corporation, Virgil J. Pague, Arthur G. Barnett and wife, Donald F. Owens and wife, and Edward R. Ester and wife (P. Tr. 14). Judgment against all defendants in the previous trial was based upon a theory of breach of contract and the trial court awarded damages upon the basis of an accounting for profits (P. Tr. 81) and in connection therewith, over the objection of the defendants (P. Tr. 60), appointed a special master to make the accounting and allowed him a fee of some \$2,500, three-fourths of which was assessed against the defendants (P. Tr. 116).

Upon the previous appeal this Court reversed the judgment of the lower court, holding that as to the personal defendants including Pague, the judgment could not be sustained on the basis of breach of contract since they were not privy to the contract and were neither amenable to specific performance or damages for breach of contract, and this Court further found that the measure of damages based upon an accounting of profits was not valid and with respect to defendant Pague the matter was

remanded for further proceedings similar to those specified for other defendants Barnett, Owens and Ester, and as to those other defendants this Court said:

“In our view justice therefore requires that the judgment as to Barnett, Owens and Easter be reversed and the cause remanded to the trial court. Upon remand the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial as may be felt proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings but may otherwise include any actual expense incurred or monetary damages sustained by the government.”

With respect to Century Investment Corporation, this Court said:

“The judgment should be reversed and the cause remanded for a trial on the issue of damages only arising by reason of its breach of contract. The measure of such damages would appear to be the same as indicated above with respect to Barnett, Owens and Ester.”

After the remand each of the defendants moved for summary judgment (Tr. 1, 7). The court granted summary judgment of dismissal as to defendant Pague and the other personal defendants (Tr. 22). This result was arrived at by construing the findings previously made (Tr. 46). In so construing the findings the court said that it:

“* * * does now again construe them to mean as the court intended at the previous trial to rule that the government never did have any right of possession and therefore had no right to an action based on any theory of wrongful

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“* * * does now again construe them to mean as the court intended at the previous trial to rule that the government never did have any right of possession and therefore had no right to an action based on any theory of wrongful

interference with that possession such as an action for trespass * * *." (Tr. 41.)

The trial court's order granting summary judgment to the personal defendants reserved as to each defendant all questions as to liability for payment of the fee of the special master in the former proceeding, with respect to which the court stated that final disposition would be made at the time of the trial of the case against Century Investment Corporation (Tr. 22, 47). The motion of Century Investment Corporation for summary judgment was denied (Tr. 22). Thereafter, the court with all defendants before it entered what was designated as Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor (Tr. 61). By this order the sum of \$2,500 was again fixed as the fee due the special master, plus \$83.00 expenses and the court charged three-fourths of that amount, or the sum of \$1,937.25, to the defendant Century Investment Corporation, Pague, Barnett, Owens and Ester, jointly and severally, and ordered that the special master could have execution against any or all of them for that amount (Tr. 61). This was the special master appointed for the purpose of making an accounting of profits from the rental of the buildings at the previous trial. Thereafter, trial was held on the issue of damages of Century Investment Corporation (Tr. 134). At the trial the only evidence introduced by the government was that of an appraiser who gave his opinion as to the on-site value of the buildings not removed as of the end of 1953 (Tr. 147). Another witness testified as to the amount which, in his opinion, the government could have received in earnings from the buildings if it had continued to own and rent them through the period 1953 through

1956 (Tr. 160). No other evidence of damages was produced. At the previous trial the government had introduced no evidence whatsoever as to pecuniary loss or damage brought about by the failure to remove the buildings, but had relied solely upon an accounting of profits earned by the defendants for renting the buildings. At the conclusion of the trial the court gave judgment for the government in the sum of \$15,000 against Century Investment Corporation (Tr. 75). Findings of Fact and Conclusions of Law were entered (Tr. 63).

III.

QUESTIONS INVOLVED

This case involves the following questions:

1. May damages for breach of contract be awarded without proof of pecuniary loss?
2. Where a special master was appointed to make an accounting which was found to be erroneous, may parties who objected to such appointment be required to pay the costs of the erroneous accounting?

IV.

ASSIGNMENTS OF ERROR

Century Investment Corporation assigns error as follows:

The lower court erred in the following respects:

1. Neither the findings nor the evidence support the judgment against this defendant.
2. The court entered a judgment against this defendant not based upon any legally recognized measure of damages or any competent evidence of damages.

Both Century Investment Corporation and defendant Virgil J. Pague assign error as follows:

The court erred in assessing against these defendants the costs of an erroneous accounting ordered over their objection and protest.

V.

ARGUMENT

1. It was Error to Award Damages Without Competent Evidence or Findings to Support Any Legally Recognized Measure of Damages.

By the mandate of the Court this matter was to be tried with respect to Century Investment Corporation on the issue of damages only arising by reason of its breach of contract. Neither the evidence nor the findings in the previous trial (P. Tr. 62) had established any pecuniary loss to the government by reason of the failure of Century Investment Corporation to carry out its contract to remove the building from the site. The lower court, after construing its previous findings, said of the facts produced at the previous trial:

“They were all gone into and the court could not discover any basis for recovery other than the one the court adopted which the appellate court has held was an erroneous theory * * *.”
(Tr. 45.)

In the trial upon remand the government introduced no evidence whatsoever as to any actual loss suffered by the government by the breach of contract, but sought to establish a theory of damages based upon what value the government might have derived from the buildings if it had never adopted the course of procedure which it did of terminating its rentals and contracting for the sale of the build-

ings (Tr. 160). The government's theory at the second trial was that damages could be measured by ascertaining what the government could have received if it had kept the buildings as a commercial owner and operated them for profit during the period from the middle of 1953 through the middle of 1956 (Tr. 160). Such a speculative measure of damages as to what would have happened if the contract had not been entered into would, of course, have no relevancy in establishing any legally recognized measure of damages for the breach of the contract that actually was entered into. The court did not adopt the theory of the government as is shown by the fact that its finding of damages of \$15,000 was in no way related to the evidence introduced by the government as to the value of the property had the contract not been entered into.

The finding of damages of \$15,000 was produced by the trial court from thin air. Paragraph XVIII of the Findings of Fact (Tr. 73) reads:

"That from all the evidence the court finds that the damage to the United States foreseeably resulting from the said breach of contract by defendant Century Investment Corporation has a momentary value of \$15,000. That in these findings this court does not deal with the evidence or subject of trespass and/or implied contract because the only defendants concerned with these issues have heretofore been dismissed from this action and because as to trespass that was decided against plaintiff and in favor of defendant at the first trial and no evidence in the record at this time justifies a different result."

There is no other finding by the court to justify the \$15,000 figure nor to indicate in what manner the figure was computed. No testimony of any kind

was produced at either the previous trial or the present trial to establish any figure of \$15,000 as the damages to the government and the figure does not comport with any theory advanced by either side in either trial. It is impossible to ascertain either from the findings, the judgment or the remarks of the court (Tr. 169) what measure of damages the court employed in arriving at this figure of \$15,000. It will be noted that the court specifically found that the award was not based upon any theory of trespass. This court in its previous opinion had laid down the measure of damages to be followed. The court said, in the previous opinion:

“We hold that as to Century the judgment should be reversed and the cause remanded for a trial on the issue of damages only arising by reason of its breach of contract. *The measure of such damages would appear to be the same as indicated above with respect to Barnett, Owens and Ester.*” (Emphasis supplied.)

The court had said with respect to Barnett, Owens and Easter:

“If recovery is warranted on either of these theories, it should not include any rental value of the buildings but may otherwise include any actual expense incurred or monetary damages sustained by the government.”

This court had thus indicated that the measure of damages would mean monetary damages sustained by the government.

We might speculate that the court added together the net proceeds to Pague, Barnett, Owens and Ester from the rentals of the buildings as shown in Paragraphs XIV, XV and XVI of the Findings (Tr. 72), which would come to \$15,812.53, and based his assessment of damages

upon that, but this court had in its opinion expressly stated that:

“If recovery is warranted on either of these theories it should not include any rental value of the buildings * * *.”

We do not presume that the trial court purposely disregarded the mandate of this court.

We submit that monetary damages cannot be produced by the court out of thin air but can be assessed only upon the basis of evidence and findings to support them. The court in its mandate had indicated that the trial with respect to Century Investment Corporation was only to determine damages arising by reason of breach of contract. If damages are to be awarded, they must be in accord with some recognized standard. This court expressly pointed that out in its previous opinion. Damages for breach of contract must be compensatory only. It is well settled in this jurisdiction that punitive or exemplary damages are not permitted. This is illustrated by the statement of the Supreme Court of the State of Washington in the case of *Anderson vs. Dalton*, 40 Wn. (2d) 894; 246 P. (2d) 853, where the Washington Supreme Court says:

“This court early committed itself to the view that the doctrine of exemplary or punitive damages is unsound in principle and that such damages cannot be recovered except when explicitly allowed by statute.”

To the same effect see *Nordgren vs. Lawrence*, 74 Wash. 305, 133 Pac. 436, and *Wood vs. Miller*, 147 Wash. 251, 265 Pac. 727.

Since this is an action to determine damages for breach of contract, we must be concerned with the proper measure of damages for breach of contract.

This measure has been stated often by the courts and succinctly it is, such amount as would put the plaintiff as nearly as possible in the position he would be in had the contract been performed. An excellent statement of this principle will be found in the Washington case of *Platts vs. Arney*, 50 Wn. (2d) 42, 309 P. (2d) 372, where the court says at page 46:

“The purpose of awarding damages for breach of contract is neither to penalize the defendant nor merely to return to the plaintiff that which he has expended in reliance on the contract. It is, rather, to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed. He is entitled to the benefit of his bargain, i.e., whatever net gain he would have made under the contract. *Munson vs. McGregor*, 49 Wash. 276, 94 Pac. 1085 (1908); *Herbert vs. Hillman*, 50 Wash. 83, 96 Pac. 837 (1908); *Herrett vs. Wershnig*, 170 Wash. 417, 16 P. (2d) 608 (1932); *Hardinger vs. Till*, 1 Wn. (2d) 335, 96 P. (2d) 262 (1939); Williston on Contracts, § 1338; McCormick on Damages, § 137.

“The plaintiff is not, however, entitled to more than he would have received had the contract been performed. If the defendant, by his breach, relieves the plaintiff of duties under the contract which would have required him to spend money, an amount equal to such expenditures must be deducted from his recovery. *Gould vs. McCormick*, 75 Wash. 61, 134 Pac. 676 (1913); *Robbins vs. Seattle Peerless Motor Co.*, 148 Wash. 197, 268 Pac. 594 (1928); *Rathke vs. Roberts*, 33 Wn. (2d) 858, 207 P. (2d) 716 (1949); Restatement, Contracts, §§ 329, 333, 335; McCormick on Damages, § 143.”

This quotation was adopted with approval in the

recent Washington case of *Wise vs. Farden*, 153 Wash. Dec. 146.

In actions for breach of contract damages are ordinarily confined to pecunniary loss resulting from the breach. Thus, Sutherland on Damages, 4th Edition, Vol. 1, Section 92 states:

“In actions upon contracts the losses sustained do not, by reason of the nature of the transaction which they involved, ordinarily embrace other than pecuniary elements.”

The mere fact that there has been a breach of contract does not in itself prove that damages are assessable. The principle is stated in 15 Am. Jur., Damages, Sec. 13, page 402, as follows:

“The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action for damages cannot, except in the cases in which punitive damages may be recovered, hold a defendant liable in damages for more than the actual loss which he has inflicted by his wrong. In other words, one injured by the breach of contract or the commission of a tort is entitled to a just and adequate compensation for such injury, but no more. His recovery is, in the absence of circumstances giving rise to an allowance of punitive damages, limited to a fair compensation and indemnity for the injury which he suffered. The law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken. The defendant may, therefore, show that notwithstanding his default, the plaintiff has suffered no damage.”

It will be noted that the text concludes with the statement that the defendant may show that notwithstanding his default, the plaintiff has suffered no damage. In the present case there was no statute

authorizing punitive damages and, of course, punitive damages are not allowable under the common law in this jurisdiction. This court, by the language of its remand, has confined the damages to:

“* * * actual expense incurred or monetary damages sustained by the government.”

Since this is an action on contract, the monetary damages sustained by the government and the expenses incurred must be those within the ordinary measures of damages for breaches of contract. Certain well-established principles govern all damages for breach of contract. Important among these principles are the following:

(1) The measure of damages for breach of a contract is the sum which will put the complainant in the *same* position as he would have been in had the obligation been fulfilled. *Lyle vs. Heidner & Co.*, 45 Wn. (2d) 806; 15 Am. Jur. 405.

(2) Damages must be items within the reasonable contemplation of the parties at the time the contract was entered into. 15 Am. Jur. 405, *Dally vs. Isaacson*, 40 Wn. (2d) 574, 578, 245 P. (2d) 200; *Winslow vs. Mell*, 48 Wn. (2d) 581, 585, 295 P. (2d) 319.

(3) There may be no recovery if the fact of damage is not established. 15 Am. Jur. 413, *Shannon vs. Shaffer Oil Company*, 51 F. (2d) 851, 78 A.L.R. 851, Annotations 78 A.L.R. 858.

We do not have any element of mental suffering, pain and anguish or any of those indefinite items which are frequently the basis of damages in tort cases. We are dealing here strictly with pecuniary compensation for breach of contract. In a breach of contract case the rule is that the plaintiff is entitled to be placed in the position he would have been in had the contract been carried out. Thus the

rule is stated in *Lyle vs. Heidner & Co.*, 45 Wn. (2) 806, 278 P. (2d) 650, where the Washington Supreme Court says:

“Generally the measure of damages for breach of an obligation is the sum which will put the complainant in the same position as he would have been in had the obligation been fulfilled.”

The rule is stated in 25 C. J. S., page 563 as follows:

“The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. In other words, the person injured is, so far as it is possible to do so by a monetary award, to be placed in the position he would have been in had the contract been performed. Another statement of the rule is that where one party to a contract repudiates it, the other party is entitled to recover the value of the contract to him at the time of its breach. On the other hand, plaintiff is not to be put in a better position by a recovery of damages for the breach of a contract than he would have been in if there had been performance.”

We are not concerned with any speculation as to what the government might have done if it had not elected to make the contract in question, but legally the issue is what compensation will put the government in the same monetary position as it would have been in had the contract been carried out.

In this case, if the buildings had been removed from the site, the government would have received no monetary benefit therefrom. *The fact that the buildings were left on the site cost the government*

nothing in money. The law does not permit the court to indulge in speculation as to what other kind of contract the government might have made, but we must deal with the contract actually made and the pecuniary damages resulting from its breach.

The mere fact that a breach of contract occurred does not give rise to any damages unless they are proved. It is incumbent upon one claiming damages to establish the fact of damage with reasonable certainty, thus, 15 Am. Jur., Damages, 410, makes the following statement:

“The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed. Damages which are uncertain, contingent, or speculative cannot be recovered either in actions ex contractu or actions ex delicto.”

While there is considerable law to the effect that where the amount of damages cannot be established with exactness, they may nevertheless be recovered if the fact of damage can be proved, there is no exception to the requirement that proof that damages occurred is essential to any recovery, and if there is uncertainty as to the fact of damages, they may not be recovered. Thus, the Tenth Circuit Court of Appeals in *Shannon vs. Shafter Oil Company*, 51 F. (2d) 851, 78 A.L.R. 851, held that although a case of breach of contract was made out, no damages could be allowed where it was not proved that some damage had resulted. The text to 78 A.L.R., 858, states the rule:

“Uncertainty as to the fact is fatal to recovery, not so, uncertainty as to the amount.”

In this case there is no certainty that the government lost anything financially by reason of the failure of Century Investment Corporation to remove the buildings. This falls directly within the rule which is stated in 15 Am. Jur. 413 as follows:

“The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of.”

There are many cases in which a breach of contract is established, but nevertheless damages cannot be held to be recoverable. Such a case is *Guglielmini vs. Walla Walla Gardeners' Association*, 157 Wash. 109, 288 Pac. 251, where it was held that one who breached a contract to receive certain vegetables was not liable where there was no proof of the damage. The court said on page 119:

“We hold that, when respondent failed to accept appellant's onions when tendered, and refused to permit him to sell them himself, the contract was breached, and substantially breached.

“The trial court found that the evidence was so vague and uncertain as to the loss sustained that no judgment could be entered therefor. In this we agree with the trial court. There is nothing in the record on which we can base an opinion as to how much more than the cost of harvesting and marketing the appellant would have been able to obtain, had he been permitted to sell his onions. We think, however, that a substantial breach of the contract such as this

justified appellant in withdrawing from the association, and that he is entitled to recover from the association his fee of three hundred dollars."

The foregoing case is an illustration of the way that the law of damages is applied to breaches of contract. It is only those pecuniary losses which follow directly from a breach that can be the subject of damages and it is only such payment as will place the complainant *in the position he would have been in had the contract been carried out* that may be awarded.

In the present case, the government was actually paid the full amount of the bid of Century Investment Corporation for the buildings, and it received the full pecuniary value of its contract. It is true that the buildings were not removed as was contemplated, but this is a matter which resulted in no loss, expense or legal damage to the government, and in the absence of proof of such legal damage there may be no recovery.

The only damages which could be allowed are those which might have been within the reasonable contemplation of the parties at the time the contract was entered into. This is a well-established principle of the law of damages with respect to contractual matters. The rule is stated in 15 Am. Jur., Damages, page 449, as follows:

"The law does not hold one liable for all injuries that may follow the breach of a contract; it limits his liability to the direct and immediate effects of the breach to the exclusion of those that result remotely from the breach. In other words, a party to a contract who is injured by another's breach of the contract is entitled to recover from the latter damages for all injuries

and only such injuries as are the direct, natural, and proximate result of the breach or which, in the ordinary course of events, would likely result from a breach and can reasonably be said to have been foreseen, contemplated, or expected by the parties at the time when they made the contract as a probable or natural result of a breach, including gains prevented as well as losses sustained. In other words, the damages shall be those arising naturally, that is, according to the usual course of things, from the breach of the contract, or such as fairly and reasonably may be supposed to have been in the contemplation of the parties to the contract at the time it was made, as the probable result of the breach, and they shall be the reasonably certain and definite consequences of the breach, as distinguished from mere quantitative uncertainty."

The same text on page 451 of 15 Am. Jur. states the rule again as follows:

"In the English case of *Hadley vs. Baxendale*, decided in 1854, the rule is laid down that the damages recoverable for breach of contract are such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things—from the breach of the contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it, and the pronouncement in that case has been generally accepted as an accurate statement of the law on the subject. Thus, the rule in contract actions is to be distinguished from the rule in tort actions, under which damages may be recovered for all injuries which proximately follow whether or not all such injuries could have been anticipated or contemplated."

The statement is made in the same text on page 454 as follows:

“It is often said that in an action for a breach of contract, the damages to be recovered are such, and only such, as may reasonably be supposed to have been in the contemplation of both parties when they made the contract.”

This last statement is backed up by the authority of *Globe Refrigerator Co. vs. Lander Cotton Oil Co.*, 190 U. S. 540, 47 L. Ed. 1171; *Western Union Telegraph Co. vs. Hall*, 124 U. S. 444, 31 L. Ed. 478. Applying that rule to the present case the parties could not have contemplated that the breach by Century Investment Corporation of the contract to remove the buildings would damage the government in any amount save that which it might be required to expend. Certainly there is no basis for holding that the breach of the contract would give the government the right to recover the amount that it might have realized if it had never entered into the contract, but instead had engaged in some commercial operation to rent the buildings; and the parties could not have contemplated that in the event of a breach the government would cause the court to commit legal error in incurring the expense of an unjustified accounting, as it did in this case. Certainly the expenses of the unjustified accounting cannot be said to have been within the contemplation of the parties.

Under the well-established rule that the measure of damages for breach of contract is that amount which would put the contractee into the position as nearly as possible as that in which he would have been had the contract been carried out, there could be no award of damages in this case because there has been no showing that the government was any

worse off pecuniarily because the buildings were permitted to remain on site than it would have been had they been removed as contemplated by the contract. Liquidated damages were not called for in the contract and actual damages have not been proved. It was error for the court to find (Tr. 73) that the breach of contract had a monetary value of \$15,000 because there was no proof to sustain that finding and there are no findings by which the measure of damages can be established. In the absence of competent findings as to the damages, it was error for the court to draw a conclusion of law (Tr. 74) that the plaintiff is entitled to judgment against Century Investment Corporation in the sum of \$15,000 and it was error to enter judgment for that amount.

2. The Court Erred in Assessing the Cost of the Erroneous Accounting Against These Defendants.

At the time of the previous trial the court, over the strenuous objection of these defendants (P. Tr. 60), ordered an accounting of the profits made by the purchasers of the buildings, and although the previous appeal resulted in a determination by this court that the accounting was not justified and that the damages based upon the net profits could not be allowed, nevertheless upon remand, the trial court again assessed these defendants three-fourths of the cost of the accounting amounting to some \$1,937.25 (Tr. 61). At the time the lower court ordered the accounting, these defendants took an exception (P. Tr. 60) on the ground that the order for an accounting was “* * * without any legal basis for an accounting.” These defendants vigorously argued that an accounting was not authorized and filed with the court a brief to that effect. That

memorandum was document 73 submitted to this court by the Clerk's Certificate in the previous appeal (P. Tr. 131). These objections to the accounting were made prior to the time that the master was appointed. At the time of the previous appeal one of the assignments of error which these defendants made was that the court erred in ordering an accounting. (See brief of Century Investment Corporation and Virgil J. Pague in Cause No. 15219.) This court clearly held on the previous appeal that the accounting was not justified or proper. Our assignment of error was fully sustained by this court when it held that an award on the basis of the net rentals received by the appellants entirely disassociated from the principle of compensatory damages was not sustainable. This court so held on page 6 of the opinion where it said:

“Here the award was not based upon expense incurred or for damages sustained by the government, or upon the reasonable rental value of the land while appellants were using it for commercial purposes. Instead, the award was based upon the net rentals received by appellants from their own buildings during the time the government had the right of possession to the land. An award on this basis entirely disassociated from the principle of compensatory damages is not sustainable on the theory adopted by the trial court.”

This court thus rendered immaterial and irrelevant everything that the master did and the grossest kind of injustice would be imposed upon these defendants to charge them with the cost of the unwarranted and erroneous reference.

It was the government that urged the erroneous action upon the lower court and these parties should not be charged with the cost of the error.

We believe that the law in this situation is that the one who caused the erroneous reference is chargeable with the accounting and not one who objected to it. A case directly in point is *Adventures in Good Eating, Inc. vs. Best Places to Eat, Inc.*, 131 F. (2d) 809. The court there said, on page 815:

“The plaintiff having asked for a reference and the court having granted it on plaintiff’s motion, the cost of such reference should be charged to the plaintiff. It was not the master’s fault that he was called to hear the controversy. He performed his duty. It was the court’s error provoked by the plaintiff’s motion that brought about this reference. The decree is modified by directing that the costs of reference in the sum of seven hundred fifteen and 51/100 (\$715.51) Dollars shall be paid by the plaintiff and not charged against the defendant.”

The principle stated in the foregoing case is logical and just. It is consistent with other decisions to the effect that even a master’s report that was justified legally but which results in nominal damages will not be charged against the defendant, thus, in *Gold Seal Importers vs. Morris White Fashions*, 4 F.R.D. 386, the court said on page 389:

“It was long ago decided that where a master’s report is confirmed by the court and awards nominal damages, the cost of the reference, including the master’s fee should be taxed against the party who obtained the appointment of the master. * * *”

To the same effect see *Everest vs. Buffalo Lubricating Oil Company*, 31, Fed. 742; *Hohorst vs. Hamburg American Packet Co.*, 76 Fed. 472; *Dowagiac Manufacturing Co. vs. Minnesola Moline Plow Co.*, 183 Fed. 314; *Salvage Process Co. vs. Acme Tank Corporation*, 104 F. (2d) 105.

In the present case the action of the lower court in ordering the reference was reversed by this court in the previous appeal. It was the plaintiff that urged the reference and secured it over the vigorous objection of these defendants. Even if it might be argued that the default of defendant Century Investment Corporation brought about the litigation, nonetheless the government was obligated to minimize any damages it had and could not aggravate the damages by causing the court to order an unwarranted reference.

In this case the work of the special master in computing the net rentals from the commercial use of the buildings has no relevancy to the question of damages and has served no useful purpose in this proceeding. This court has specifically held in its previous opinion that the net rentals may not be the basis for assessing the damages. Although in the findings in this case the court undertakes to set out these amounts of net rentals in paragraphs XIV, XV, XVI (Tr. 72), they relate to the measure of damages previously held by this court to be inapplicable. In no manner do they indicate the pecuniary losses to the government by reason of the breach of contract. The reference to the master was simply erroneous and unjustified. It was error for the trial court to charge the cost of this erroneous reference against the defendants who objected to it.

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,

Attorneys for Appellants Century
Investment Corporation and
Virgil J. Pague

Office and Post Office Address:
400 Hoge Building, Seattle 4, Washington

In the United States Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, AND DON S. GRIFFITH,
SPECIAL MASTER, APPELLEES

VIRGIL J. PAGUE, APPELLANT

v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD F. OWENS, ET AL., APPELLEES

EDWARD R. ESTER, ET AL., APPELLANTS

v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

Upon Appeal From the United States District Court for the
Western District of Washington, Northern Division

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General

CHARLES P. MORIARTY,
*United States Attorney,
Seattle, Washington.*

JOSEPH C. MCKINNON,
*Assistant United States
Attorney,
Seattle, Washington.*

ROGER P. MARQUIS,
HAROLD S. HARRISON,
*Attorneys,
Department of Justice,
Washington 25, D. C.*

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16360

CENTURY INVESTMENT CORPORATION, APPELLANT

v.

**UNITED STATES OF AMERICA, AND DON S. GRIFFITH,
SPECIAL MASTER, APPELLEES**

VIRGIL J. PAGUE, APPELLANT

v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

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EDWARD R. ESTER, ET AL., APPELLANTS

v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

**Upon Appeal From the United States District Court for the
Western District of Washington, Northern Division**

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The District Court did not write an opinion. Its findings of fact and conclusions of law appear in

the printed record at pages 63-75. Earlier findings of fact and conclusions of law and supplemental findings of fact and conclusions of law appear at pages 62-81 and 107-113 of the printed record in the prior appeal to this Court in an earlier stage of this case (No. 15219), which printed record has been designated as a part of the record on appeal in the instant case.¹

JURISDICTION

This case involves cross-appeals from various orders entered by the District Court. The appeals by the defendants² below, answered herein, are from that part of the judgment respecting the compensation and expenses of the special master and responsibility therefor. The jurisdiction of the district court was invoked by the United States under 28 U.S.C. sec. 1345 (PR. 3). Notices of appeal were filed by the defendants on November 20, 1958, and November 28, 1958 (R. 78, 79, 84). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Where a special master has been appointed in an equity proceeding as a result of defendant's wrongful use of property, may the appointing court prop-

¹ References to the prior record will be indicated as (PR. ———) while references to the printed record in the instant case will be shown as (R. ———).

² Since the defendants below are both appellees and appellants in the present cross-appeals, reference to them will be as defendants.

erly charge a part of the master's fees and expenses to the defendants.

STATEMENT

The brief filed on behalf of the United States as appellant in this case outlines generally the factual situation presented on these cross appeals. For that reason, we here summarize the facts which particularly bear on the matter of the fees and expenses of the special master, which is the subject of the appeals by the defendants.

This is an equity proceeding (PR. 74). By its action the United States sought to require compliance with a congressional mandate that temporary war housing be removed and the sites cleared and for redress for the violations of its rights growing out of the failure of defendants and others to so remove temporary war housing from lands the use of which had been acquired by the United States for such housing (PR. 3-22).

After a trial, the District Court found that all of the defendants had full and complete knowledge of the contractual obligation of Century Investment Corporation, from whom they purportedly acquired their interest in the buildings, that the buildings be removed from site (PR. 64-65, 68-73). The District Court concluded that the failure to remove the temporary housing constituted irreparable injury to the United States for which it had no adequate remedy at law (PR. 76) and that the individual defendants had acquired no better title to the buildings than Century Investment Corporation had and were not

innocent purchasers of same without knowledge and notice of the contract's expressed requirement that the buildings be removed from the site upon which they were situated at the time the contract with Century was executed (PR. 77-78). Accordingly, the District Court was at that point of the proceedings of the view that the United States was entitled to specific performance of the contract as against all of the defendants (PR. 78).

In the course of expressing its decision orally, the District Court stated, *inter alia*:³

The Court further so finds, concludes and decides that defendants' failure to comply with the contract and remove the buildings constitutes an irreparable injury, because it enabled the defendants, and each and all of them, to operate the buildings in question on the site where they were first constructed as commercial buildings, as rental housing units, and for other commercial purposes, as to which the plaintiff was, and still is, without an adequate remedy at law to obtain redress for such breaches of the contract of purchase and sale;

* * * *

And so the Court finds, concludes and decides from the preponderance of the evidence, that since there is evidence that such commercial use of the buildings was made by the defendants, and such commercial business was carried on by

³ The Oral Decision by the District Court, to which reference is here made, is printed as an appendix to the brief for the United States as appellee in the earlier stage of this case in this Court (No. 15219). The excerpts quoted above are there found at pages 37-38, 39-40.

the defendants on the site from which they were obligated to remove the buildings during the period complained of, the plaintiff is entitled to a full and complete accounting of all the monies received and all expenses paid on account of any and all such commercial businesses so conducted by the defendants. * * *

Accordingly, the District Court referred the case to a special master (Don S. Griffith, a practicing certified public accountant) for that purpose (PR. 82-83). After hearings and the submission of evidence, income received by the defendants from the rental units, less the normal operating expenses, was determined by the special master who filed a report and supplemental report embodying his findings and conclusions.⁴

On April 26, 1956, after noting that it had "heretofore entered an Order approving and confirming the supplemental report of Special Master, filed herein on January 18, 1956," the District Court went on to make supplemental and amendatory findings of fact and conclusions of law (PR. 107-113). While those supplemental findings and conclusions expressly hold the defendants' use of the buildings to be "wrongful" (PR. 109, 112), the District Court abrogated its earlier position and declined to order specific performance of the contract of removal and site clearance, for a reason which the United States as appellant contends to be erroneous (see particularly pp. 14-19 of "Brief for the United States, Appellant")

⁴ Portions of those reports appear in the printed record of the earlier case in this Court (PR. 84-91).

filed in the instant case). Instead of doing so, the District Court concluded to award damages to the United States against the various defendants as follows: \$5,937.13 for buildings 102 and 103 against Virgil J. Pague and Century Investment Corporation; \$3,709.31 for building 104 against Barnett and wife, Owens and wife, and Century Investment Corporation; \$2,432.59 for building 105 against Ester and wife and Century Investment Corporation. Each award was against the named parties, jointly and severally (PR. 68-70, 109-111).

The District Court also found that a reasonable fee for the services of the special master was \$2,500.00, and that reasonable expenses incurred by him amounted to \$83.00. The District Court held that one-fourth of these amounts should be paid by the plaintiff and three-fourths should be paid "by the defendants, and each of them, and in this regard the defendants' obligation shall be joint and several" (PR. 110-111).

On appeal by the defendants this Court reversed and remanded the case to the District Court (*Century Investment Corporation v. United States*, 250 F.2d 139 (1957), cert. den. *sub nom. Ester, et al. v. United States*, 356 U.S. 950). This Court took the view that the District Court had measured liability for damages in lieu of specific performance by rents which the defendants had received from the buildings and held that that was not a valid theory upon which to award damages. This Court expressly left open the possibility of recovery under trespass and implied contract. In the course of its opinion, this Court

also recognized that the defendants had acted with full knowledge of the Century contract (250 F.2d at p. 139).

Upon the remand, though it expressed the view (a) that the individual defendants “were bound by the conditions of the contract” (R. 101); (b) that they had full knowledge of the Century contract and that it “was wholly inequitable and unconscionable for them to disregard the rights of the United States of America under the Century contract, of all of the terms of which they were well aware, and took the property interests they had purchased by succession at their peril” (*ibid.*); and (c) though it characterized the actions of the individual defendants as “their equitable wrong” (R. 102), the District Court “most reluctantly” (R. 128) granted motions of summary judgment dismissing the individual defendants from the action. It did so under the belief—mistaken, we submit (see Brief for the United States, Appellant)—that the opinion and mandate of this Court required such dismissal. Accordingly, the District Court awarded damages in favor of the plaintiff only as against the corporate defendant (R. 77). In granting summary judgment of dismissal as to the individual defendants, the District Court expressly reserved as against each of the defendants “all questions as to liability for the payment of the fee of the Special Master, Don S. Griffith” and provided that “with respect to the petition of Don S. Griffith for payment of his fee final disposition will be made with respect to all parties, including the defendants above-named [the individual defendants, appellants

herein] at the time of trial of the case against Century Investment Corporation or at the time fixed by the Court" (R. 23). Accordingly, the District Court thereafter entered an order fixing compensation and expenses of the special master and charging responsibility therefor (R. 61-63). The pertinent paragraph of that order provides (R. 62-63):

It Is Hereby Ordered and Adjudged that a fair, just and reasonable fee for his services as Special Master herein is hereby awarded to Don S. Griffith in the sum of Twenty-Five Hundred (\$2,500.00) Dollars together with Eighty-three (\$83.00) Dollars incurred by him for the services for a court reporter; that one-fourth of said amounts in the sum of Six Hundred Forty-five and 75/100ths (\$645.75) Dollars shall be paid by plaintiff and three-fourths of said amounts in the sum of One Thousand Nine Hundred Thirty-seven and 25/100ths (\$1,937.25) Dollars shall be paid by the defendants, Century Investment Corporation; Virgil J. Pague; Arthur G. Barnett and the marital community composed of Arthur G. Barnett and Virginia N. Barnett, his wife; Donald F. Owens and the marital community composed of Donald F. Owens and Jean Owens, his wife; Edward R. Ester and the marital community composed of Edward R. Ester and Lorraine M. Ester, his wife, and each and all of them and in this regard the defendants' obligation is joint and severally, and if the defendants do not pay the share of compensation and expenses herein charged to them within 60 days from the date hereof, the Master may have execution against any or all of them for the same.

The final judgment by the District Court filed the same day, i.e., September 29, 1959, confirmed that order in all respects (R. 77).

The appeals by the individual defendants are from the "Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor" (R. 79, 84-85). The Century Investment Corporation also appeals from the judgment of September 29, 1959, as well as from the "Order Fixing Compensation and Expenses of Special Master and Charging the Responsibility Therefor" (R. 78).

The statements of points on appeal filed by the various parties appear in the printed record at pages 88-91. It was stipulated that the printed transcript of the record on the previous appeal (No. 15219) may be considered by the Court in the instant case (R. 172-173).

SUMMARY OF ARGUMENT

1. Since the defendants' major premises in their argument as to the special master's fees are erroneous, their arguments fall. It is clear that the defendants, not the plaintiff, are responsible for the situation resulting in the appointment of the special master and that the defendants should, at the very least, bear the part of the fee and expenses allocated to them. In any event, the matter is within the sound discretion of the trial court and no abuse of that discretion has been shown. There is clearly no merit to defendants' allegation that the matter of the special master's fee and expenses is *res judicata*.

2. The law relating to the liability of the United States for costs clearly demonstrates the error of defendants' contentions.

3. The separate assignments of error by the Century Investment Corporation are clearly without merit. The findings, the evidence adduced, and express statements by the District Court all clearly support the judgment against the Century Investment Corporation which is really only token damages as compared to the substantial damages reflected by the findings and evidence.

ARGUMENT

Introductory: While a brief as appellants has been filed by defendants Century Investment Corporation and Virgil J. Pague (referred to herein as Century Br. —) and a separate brief as appellants has been filed on behalf of defendants Edward R. Ester, Arthur G. Barnett and Donald F. Owens (referred to herein as Ester Br. —), as was the case on the prior appeal in No. 15219, the Government sees no need to burden this Court with two briefs for the United States as appellee. Accordingly, arguments advanced in both briefs filed on behalf of the various defendants as appellants will be treated herein.

I

THE MAJOR PREMISES OF THE DEFENDANTS' BRIEFS ARE ERRONEOUS AND HENCE THEIR ARGUMENTS FALL

A. Defendants, not the United States, are responsible for the situation which brought about the ap-

pointment of the special master:—Ignoring the very purpose and nature of the case, as well as express findings and statements by the District Court, defendants would have it appear that actions by the plaintiff were responsible for the appointment of the special master so that it should be required to pay all his fee and expenses. The record discloses otherwise. The very reason why the action became necessary in the first place was, in the words of the District Court (Oral Decision of September 7, 1955, printed as an appendix to the “Brief for the United States, Appellee” in No. 15219, pp. 37-38, emphasis added): “* * * defendants’ failure to comply with the contract and remove the buildings constitutes an *irreparable injury*, because it enabled the defendants, *and each and all of them*, to operate the buildings in question on the site where they were first constructed as commercial buildings, as rental housing units, and for other commercial purposes, *as to which the plaintiff was, and still is, without an adequate remedy at law to obtain redress for such breaches of the contract of purchase and sale; * * **”.⁵ As there indicated by the District Court (*ibid.*, p. 38), and as expressly found by it (PR. 64-65, 71-73) all of the individual defendants had full and complete knowledge of the contractual obligation that the buildings in question be removed from site. This Court similarly noted such fact (250 F.2d at p. 141). Also, the fact that the defendants’ use of the property involved was “wrongful” has been expressly noted by

⁵ This same thought was embodied in the District Court’s initial conclusions of law (No. VIII, PR. 76).

the trial court (PR. 109, 112) as has the fact that defendants' conduct has been "wholly inequitable and unconscionable" and constituted an "equitable wrong" (R. 101, 102). The District Court also made clear its view that the corporate entity was not "of sufficient independence of the parties who formed it or of the persons who knew in fact of what the contract was and took their rights in the property subject to the contract and therefore were bound by the conditions of the contract" and that the corporate entity was not sufficiently clear "to shield the other defendants from liability" (R. 101). In these circumstances, it comes with ill grace for the defendants even to suggest that the United States, to whom they have caused irreparable injury, should pay all of the expenses of the special master.⁶ This is particularly so since, as will now be shown, the awarding of fees and expenses such as here involved is a matter lying within the sound discretion of the trial court and factors such as described above have historically been considered in determining discretionary matters. It should be noted that this Court's holding on the first appeal was not that these defendants were innocent parties free of all possible liability but that the specific remedy—damages in lieu of specific performance—was not available for lack of privity of contract.

⁶ In these circumstances, defendants' use of phrases such as "not substantial justice" and "strange and unjust" (Ester Br. 6, 8) in contending that they should not be required to bear any part of the fee and expenses of the special master, also comes with ill grace.

B. *The matter is within the discretion of the trial court and clearly no abuse of discretion has been shown*:—As expressly stated by the District Court, this “is an equity proceeding” (PR. 74).⁷ Masters’ fees are costs (*Dyker Bldg. Co. v. United States*, 182 F.2d 85, 89 (C.A. D.C. 1950); *Mallonee v. Fahey*, 122 F.Supp. 472, 475 (S.D. Calif. 1954); *Aycrigg v. United States*, 124 F.Supp. 416, 419 (N.D. Calif. 1954)) and it has long been established that costs are within the discretion of the trial court and not a subject for review in an appellate court. E.g., *Bankers Securities Corp. v. Ritz Carlton R. & H. Co.*, 99 F.2d 51, 52 (C.A. 3, 1938); *T. L. James & Co. v. Galveston County*, 74 F.2d 313, 316 (C.A. 5, 1935). This is particularly so in suits in equity. *Kittredge v. Race*, 92 U.S. 116, 121 (1875); *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 83 (1924);⁸

⁷ Compare the statement in Century Br. 14 that “Since this is an action on contract * * *” and the argument which follows it, all of which is clearly inapposite in the instant proceeding which is primarily equitable in nature as recognized by the District Court.

⁸ Incidentally, *Newton v. Consolidated Gas Co.* states another principle which is fatal to the appeals by the individual defendants in the instant case. That is that “an appeal does not lie from a decree solely for costs” (265 U.S. at p. 82). In the instant case the appeals by the individual defendants are solely from the “Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor” (R. 79, 84-85). The appeal is, of course, properly from the judgment which disposes of the whole subject matter and all causes of action involved. E.g., *Southland Industries v. Federal Communications Com’n*, 99 F.2d 117, 118 (U.S.App.D.C. 1938); *Hunter v. Federal Life Ins. Co.*, 103 F.2d 192, 194 (C.A. 8, 1939); *In re Prindible*, 115 F.2d

Tyler Min. Co. v. Sweeney, 79 Fed. 277, 281 (C.A. 9, 1897); *Ruby Lee Minar, Inc. v. Hammett*, 53 F. 2d 149 (U.S.App.D.C. 1931);⁹ *United States v. Bowden*, 182 F.2d 251, 252 (C.A. 10, 1950). See *Buck v. Bilkie*, 63 F.2d 447 (C.A. 9, 1933). In view of the findings, conclusions and statements by the trial court recited above, it is clear that there has been no abuse of discretion here.

C. *The matter of the special master's fee and expenses is not res judicata*:—The defendants as appellants here would have it appear that the prior opinion and mandate of this Court settled the fee and expenses matter insofar as they are concerned (e.g., Century Br. 21-22; Ester Br. 5, 6-9). This Court did recite, after setting out the awards against the various defendants in the earlier case, that (250 F. 2d at p. 142): "These sums represented the net revenue received by the respective appellants [defendants] from rental of the buildings, as determined by the special master. It was found that the special master was entitled to a reasonable fee and expenses in the sum of \$2,583, three-fourths of which should

21, 22 (C.A. 3, 1940). In the instant case that is the judgment of September 29, 1959, which, *inter alia*, confirmed the order respecting the compensation and expenses of the special master (R. 75-77). As shown by the cited cases, this matter is jurisdictional.

⁹ It should be noted that the *Ruby Lee Minar* case is a close parallel to the instant case. The cited case was also a cross-appeal situation in an equity proceeding in which the matter of costs had twice been considered by the trial court. The Court of Appeals disposed of the appeal as to costs in short order.

be paid by appellants, jointly and severally. * * *” But this Court clearly made no ruling with respect to the fee and expenses of the special master which is *res judicata* here. And while this Court held that the rentals received by the defendants could not measure the monetary value of a substitute for specific performance, this Court did not, as the District Court thought (R. 129-130), hold that the rentals could be used for no purpose in arriving at damages under other theories advanced by the United States. Indeed, this Court left the matter of liability and damages which might properly be awarded on other theories open. As the United States has demonstrated in its brief as appellant (1) the rentals can properly be used to measure the unjust enrichment giving rise to an implied contract in this case; and (2) the rents the defendants collected were some evidence of rental value to support trespass damage.

II

DEFENDANTS’ ARGUMENTS ARE OTHERWISE UNSOUND

While what has been stated heretofore fully warrants affirmance of the District Court’s judgment insofar as it relates to the fee and expenses of the special master, there is another principle of law which demonstrates the unsoundness of the defendants’ arguments.

As has been shown with citation of pertinent authorities, *supra*, p. 13, it is clear that masters’ fees are costs. 28 U.S.C. sec. 2412(a) provides that “The United States shall be liable for fees and costs only

when such liability is expressly provided for by Act of Congress." F.R.Civ.P., Rule 54(d), provides that costs against the United States shall be imposed only to the extent permitted by law. No statute authorizing the taxing of masters' fees against the United States is known. It is well-settled that unless there is express statutory authority for the allowance of costs against the United States, such an award is precluded by 28 U.S.C. sec. 2412(a). *Ewing v. Gardner*, 341 U.S. 321 (1951); *United States v. Chemical Foundation*, 272 U.S. 1, 20-21 (1926); *United States v. Patterson*, 206 F.2d 345, 348 (C.A. 5, 1953). Indeed, in the absence of a statute directly authorizing it, courts will not give judgment against the United States for costs even though the costs are incurred in an action which the United States has brought and in which it has failed to establish its claims. *Walling v. Norfolk Southern Ry. Co.*, 162 F.2d 95, 96 (C.A. 4, 1947). And in order to subject the sovereign to liability for court costs, there must be clear and unequivocal statutory authorization, and such authorization may not be inferred. *Aycrigg v. United States*, 124 F. Supp. 416, 417 (N.D. Calif. 1954). As the last-cited case spells out in some detail, masters' fees are costs which cannot be taxed against the United States in the absence of statutory authority.

In the instant case the United States has voluntarily paid the one-fourth share of the master's fee and expenses as allocated by the District Court.¹⁰

¹⁰ Compare the erroneous charge in the Ester Brief that the United States "to this date has not paid the Master"

The United States has not here charged the District Court with error in this respect nor has the United States urged that it bear none of the fee and expenses of the special master. While we believe that such a position would be fully warranted in the circumstances of this case, the District Court has indicated its view in the matter and the Government has been willing to comply with that view on a voluntary basis. We submit, however, that there is clearly no warrant for the defendants' attempt to shift the burden of the whole fee and expenses of the special master on the United States, which, it should be remembered, is the injured party.

III

THE FINDINGS AND EVIDENCE CLEARLY SUPPORT THE JUDGMENT AGAINST THE CENTURY INVESTMENT CORPORATION

In addition to joining in the appeal with the individual defendants with respect to the matter of the fees and expenses of the special master (Century Br. 8, 21-24), on its own the Century Investment Corporation assigns error as follows (Century Br. 7):

The lower court erred in the following respects:

1. Neither the findings nor the evidence support the judgment against this defendant.

(fn. 5, p. 11). For the information of this Court, payment of the \$645.75 representing one-fourth of the compensation and expenses of the special master was authorized on February 27, 1959, and payment was duly effected on April 21, 1959.

2. The court entered a judgment against this defendant not based upon any legally recognized measure of damages or any competent evidence of damages.

Express findings, conclusions and statements by the District Court make the want of merit in such allegations manifest.

Initially, it should be noted that the fact that this whole endeavor to avoid statutory and contractual obligations—which unfortunately for the public interest has been permitted by the District Court to be successful to date—was purposely conducted in the name of the Century Investment Corporation to protect individual assets of a substantial nature, has been made clear by the District Court. Finding of Fact IV, PR. 64-65, R. 66. Also, there is no question but that Century breached its contract which constituted “irreparable injury to the plaintiff for which it had no adequate remedy at law” and which prevented the plaintiff “from executing the mandate of Congress” (PR. 76). Indeed, by its present counsel, the Century Investment Corporation announced to the District Court that “We are not going to contend there wasn’t a breach of contract” (R. 128). We will now show that the record demonstrates that the findings and evidence clearly support the judgment against the Century Investment Corporation. As a matter of fact, a much larger judgment would have been fully supported by the evidence.

The District Court expressly found as follows (R. 70):

X

That Century Investment Corporation has never removed buildings 102, 103, 104 and 105, and by its actions has made it impossible for plaintiff United States of America to have the buildings removed and the site restored, thereby causing plaintiff United States of America substantial damages.

XI

That buildings 102, 103, 104 and 105 still remain on the site and are still occupied as dwelling units at that place, contrary to the provisions of the contract and the intent of the parties to the contract, although plaintiff, in consideration of defendant Century Investment Corporation's promise to remove the buildings from the site and clear the land upon which the buildings had stood, sold those buildings to that defendant for a total sum of \$8,694.00 when they had a total on-site value of \$132,636.58.

Those findings are supported by the evidence adduced in the District Court (R. 147). Other findings, which are in turn fully supported by the evidence, also clearly support the judgment rendered (e.g., R. 70-73, 156-160, 165-166).¹¹

¹¹ Additionally, the very situation created by the breach of contract by the Century Investment Corporation, which constituted "irreparable injury to the plaintiff for which it had no adequate remedy at law" (PR. 76), obviously caused otherwise unnecessary expenditures of public funds. Thus, as noted by this Court: "Under this contract, Century purchased the buildings and agreed to remove them from the tracts on which they were situated, and to clear the sites by November 12, 1953" (250 F.2d at p. 141). Because of

An award of damages need not—and, indeed, normally should not—be mathematically ascertainable from any particular part of the evidence (cf. Century Br. 9-11, 21).¹² It is sufficient that there is evidence to support the award, which, as shown above, is clearly the situation here presented.

It is also to be noted that the United States did not confine itself to an action at law since, as the District Court concluded, the Government “had no adequate remedy at law” (PR. 76). This Court recognized that equitable relief was sought (250 F.2d at p. 144, fn. 6). The District Court states as its initial conclusion of law in this case “That this is an equity proceeding” (PR. 74). In these circumstances, the effort to present this case as being simply “an action on contract” (Century Br. 14) is inappropriate and cases cited in that respect are inapposite.¹³

the failure to remove the buildings and clear the sites, the Government found it necessary to renew its exclusive use of the land through June 30, 1956 (*ibid.*, fn. 3).

¹² The gratuitous speculation that the District Court “added together the net proceeds to Pague, Barnett, Owens and Ester from the rentals of the buildings as shown in Paragraphs XIV, XV and XVI of the Findings (Tr. 72), which would come to \$15,812.53, and based his assessment of damages upon that * * *” (Century Br. 10-11), is, of course, totally unwarranted. As noted, *infra*, p. 21, the judgment against the Century Investment Corporation was expressly based upon “a preponderance of all of the evidence received in this case from the beginning of this case to the present time” (R. 169).

¹³ It is, of course, the fundamental policy of the federal rules to accord litigants the relief to which they are en-

At the close of the evidence and following oral argument by counsel, the District Court announced (R. 169-170):

From a preponderance of all of the evidence received in this case from the beginning of this case to the present time, all of which evidence has been considered by the Court, the Court does find, conclude and decide as follows:

On the question of how much damages did the plaintiff sustain by reason of the breach of the contract for the sale to, and site removal of the buildings in question by, the Century Investment Corporation, that the sum of \$15,000.00 is the fair, reasonable and just sum so sustained by the plaintiff on account of said breach of contract by the defendant Century Investment Corporation * * *

It is submitted that that statement is fully supported by the evidence, which in fact could, and we believe should, have been in a much greater amount and against all of the defendants (see Brief for the United States, Appellant).

titled in one form of action. F.R.Civ.P., Rules 1, 2, 18, and see *United States v. 93.970 Acres of Land*, 360 U.S. 328, 332 (1959). It should be noted also that it is the express policy of those rules that "All pleadings shall be so construed as to do substantial justice." F.R.Civ.P., Rule 8(f).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be affirmed insofar as it charges the defendants with three-fourths of the fee and expenses of the special master and insofar as it holds the defendant Century Investment Corporation liable in damages to the United States.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General

CHARLES P. MORIARTY,
*United States Attorney,
Seattle, Washington.*

JOSEPH C. MCKINNON,
*Assistant United States
Attorney,
Seattle, Washington.*

ROGER P. MARQUIS,
HAROLD S. HARRISON,
*Attorneys,
Department of Justice,
Washington 25, D. C.*

OCTOBER 1959.

No. 16360

In the United States Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA, and
DON S. GRIFFITH, Special Master,

Appellees.

VIRGIL J. PAGUE,

Appellant,

vs.

DON S. GRIFFITH, Special Master,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

DONALD F. OWENS, et al,

Appellees.

EDWARD R. ESTER, et al,

Appellants,

vs.

DON S. GRIFFITH, Special Master,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HON. JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS CENTURY INVESTMENT
CORPORATION AND VIRGIL J. PAGUE IN ANSWER
TO BRIEF FOR UNITED STATES, APPELLANT

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN

Attorneys for Appellants
Century Investment Corporation
and Virgil J. Pague

Office and Post Office Address:
400 Hoge Building, Seattle 4, Washington

In the United States Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION,	<i>Appellant,</i>
vs.	
UNITED STATES OF AMERICA, and DON S. GRIFFITH, Special Master,	<i>Appellees.</i>
VIRGIL J. PAGUE,	<i>Appellant,</i>
vs.	
DON S. GRIFFITH, Special Master,	<i>Appellee.</i>
UNITED STATES OF AMERICA,	<i>Appellant,</i>
vs.	
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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Century Investment Corporation
and Virgil J. Pague

Office and Post Office Address:
400 Hoge Building, Seattle 4, Washington

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No. 16360

In the United States Court of Appeals
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CENTURY INVESTMENT CORPORATION, *Appellant,*

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DON S. GRIFFITH, Special Master, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
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NORTHERN DIVISION

HON. JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS CENTURY INVESTMENT
CORPORATION AND VIRGIL J. PAGUE IN ANSWER
TO BRIEF FOR UNITED STATES, APPELLANT

I.

JURISDICTION

For the purposes of this Brief, the statement of jurisdiction contained in Brief of Appellants Cen-

ture Investment Corporation and Virgil J. Pague, previously filed, is adopted.

II.

STATEMENT OF THE CASE

These parties adopt the Statement of the Case made in their Brief of Appellants previously filed.

Exception is taken to the Statement of the Case in the Government's Brief, particularly with regard to matter contained on Page 8, in which it is sought to imply that the Government had tendered the taxes or that the exact amount of the taxes could not be determined. These facts were gone into at the previous trial and findings were made contrary to the statements made on Page 8 of the Government's Brief in this appeal. (P.Tr. 108).

The trial Court found that it was the "ascertainable" taxes which had not been paid (P.Tr. 108). The first time that any attempted payment occurred of the taxes required as a part of the consideration for the tenure, was on July 8, 1958 (Tr. 21). This was over two years after July 1, 1956, the latest date the Government ever claimed to have any estate in the land (P.Tr. 109), and was subsequent to the filing of the remittitur in this case and the motions for Summary Judgment (Tr. 1, 7), and even then was not in conformity in amount with the ascertained taxes (Tr. 21) nor was it unqualifiedly made available even as reimbursement for the ascertained taxes which these parties had had to pay.

At the time of the previous trial, the Court found the Government to be in arrears in the payment of that part of the consideration represented by taxes

and the Government showed an attitude of not intending to pay them. (Tr. 136-137).

III.

SUMMARY OF ARGUMENT

The Government's present appeal is precluded by previous determinations which have become the law of the case, and by the Government's failure to take a timely appeal.

IV.

ARGUMENT

1. The Law of the Case Precludes the Government's Present Appeal.

The matters raised in the Government's Assignments of Error were all before this Court in the previous appeal.

The contention that some different results must follow because of the full knowledge of all the individual defendants of the removal requirements was fully urged when this matter was before the Court before and was decided by the Court contrary to the Government's present contention.

Thus, in the previous opinion, this Court in discussing the Government's contention, says:

"The Government urges, however, that in any event the award can be sustained on the theory of constructive trust. *Angle v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 151 U.S. 1, is cited as authority for this proposition. In that case, the defendant was declared a trustee ex maleficio in respect to certain property, upon a showing that the property had been acquired through fraudulent inducement to breach a contract.

"There is, in our case, no proof or finding

that the conduct of Barnett, Owens or Ester was fraudulent in any respect. Nor is it shown or found that they did anything to induce Century to breach its contract. The most that is shown is that Barnett, Owens and Ester knew of the contract, and of its breach, at the time they acquired their interests in the lands and buildings. Such a showing provides no basis for the imposition of a constructive trust.

“Other theories advanced by the Government include trespass, unjust enrichment, and quasi contract.”

The rule is well established that questions which were, *or could have been* raised on a previous appeal, become concluded and may not be raised on a second appeal. 3 Am. Jr. 549, states the rule as follows:

“The general rule, supported by the great weight of authority, is to the effect that questions which might have been, but were not, raised or presented on a prior appeal, or error proceeding, will not be considered on a subsequent appeal, or error proceeding—in other words, that where the prior judgment was on the merits, nothing is before the Court on a subsequent appeal except the proceedings subsequent to the first mandate, all matters occurring prior thereto and which could have been adjudicated on the former hearing being regarded as controlled by the law of the case rule.”

The theories now urged by the Government for holding the individual defendants were or could have been raised on the previous appeal. The Government initially appealed when the case came to this Court before and then dismissed their appeal. (P.Tr. 142).

The finding of the lower Court to the effect that

the Government had failed to pay the full compensation, became a conclusive determination by reason of the failure to assign error to it on the previous appeal. The arguments made with respect to effect of the failure to pay this compensation were also advanced in the previous appeal.

The Government seeks in this proceeding to re-litigate the identical matters which were briefed and argued previously. When the case was initially tried, the lower Court treated the failure of the Government to meet the requirements for paying compensation for the leaseholds, as a condition subsequent to the Government's tenure and entered a conclusion of law (P.Tr. 111) to the effect that it was incumbent upon the plaintiff to prove the exclusive right of possession of the land and that it had not fully sustained the burden and was therefore not entitled to an order compelling the present owners to remove the buildings from the sites. This conclusion of law became the law of the case upon failure of the Government to appeal from it. The conclusion was legally correct, *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 34 L.Ed. 295; *U.S. v. Lee* 106 U.S. 196, 27 L.Ed. 171.

On the previous appeal this Court determined all the issues before it and sent the case back for trial on narrow issues which were specified in the opinion. The Court authorized the District Court to, "determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial." The Court went on to say,

"If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any

actual expense incurred or monetary damages sustained by the Government.”

It was upon these narrow issues that the matter was presented to the lower Court upon the Motions for Summary Judgment. (Tr. 7, 1) The lower Court, in accordance with the authority granted by this Court in the remittitur, construed its previous findings and disposed of the case with respect to all the personal defendants, including Pague, by construing its previous findings to eliminate the uncertainty which this Court had thought might exist as to whether there had been a total failure of the Government to pay the installments, or whether the installments had merely been paid late. The Court, in construing the previous findings, said (Tr. 129)

“... this Court did intend to, and thought it did decide at the previous trial that the Government had not established and could not establish any right to possession at any time material to this action, and that there could not therefore be any basis for an action for trespass...”

The trial Court clearly found that there had never been any previous tender of the consideration necessary to keep the leases alive before the belated tender made after the Motions for Summary Judgment were ready to be heard (Tr. 114). The Court specifically found that the payments were not ultimately made (Tr. 115). It specifically rejected an attempt of the Government to make a tender in an indefinite amount just before the Motions for Summary Judgment were to be argued, saying (Tr. 114),

“Surely two years is too late to wait to make a valid tender of this kind, in view of the fact that during all of that two year delay by the

Government in making this tender, these parties were in open dispute about this matter, and in view of the further fact that in the course of the former trial of this case, the non-payment by the Government of its easement term extending dues, was the subject of extensive consideration by counsel for both sides of the litigation and by the Court.

“This tender, if in correct amount as of the 8th day of July, 1958, when it was finally made, could have been ascertained as to correct amount and could just as well have been made at a time earlier in the approximate two year period of the Government’s delay following the termination of the effective term of the easement which the Government had and which is the subject of the renewal desired as a result of this belated tender made in this case, or in the related case and this Court, on the 8th day of July, 1958. Therefore the Court rules that the tender was too long delayed and is not a valid tender and has no effect so far as concerns effective renewal of the easement of the Government which is involved in this case.

“The Court does now further consider the matter in the light of the matter already noted. The Court had no way of knowing until the 8th day of July, 1958, that the Government ever wanted to make any tender or ever wanted to extend these leases so far as the proof in the record in this case is concerned.”

The Court, thus, on the narrow issue presented to it by this Court, did dispose of the matter as to the personal defendants by construing its findings to hold that there never had been a payment and that the rights of the Government against the personal defendants could not be based upon trespass or implied contract to pay the reasonable rental value of the land.

In view of the previous holding of this Court, that construction of the findings completely disposed of any liability against the individual defendants. Insofar as liability based upon any other theory was concerned, the law of the case rule governs and all theories which were or could have been raised on the previous appeal were settled when the Court fixed the scope of the action of the trial Court upon the remand.

The matter to be determined by the lower Court under the remittitur related to the obligation to pay rent for the land or an implied contract to pay for trespass upon the land. Since the Court construed the previous findings to hold that the Government had no tenure to the land, the personal defendants were properly dismissed.

With respect to Century Investment Corporation, the matter was before the Court for trial "on the issue of damages only." This Court said, in its opinion,

"The measure of such damages would appear to be the same as indicated above with respect to Barnett, Owens and Ester."

Here again, the fact that there was no tenure on the part of the Government in the land, prevented a judgment against Century Investment Corporation based upon implied contract to pay rental for the land or for trespass and left only the question of damages arising by reason of its breach of contract.

The matter is before this Court now only with respect to *matters occurring after the remand*. With respect to the personal defendants, no additional evidence was introduced and there is nothing before the Court that has not already been disposed of.

2. The Government's Appeal as to Defendant Pague Came too Late.

A final judgment dismissing defendant Pague from the action was entered by the Court on July 11, 1958 (Tr. 22). Motion for rehearing and reconsideration was denied by the Court with respect to this Summary Judgment on August 22, 1958. At that time the Court said,

“... and the said Order granting summary judgment on the date that it was signed was then, and is now, intended to be a final judgment except as to all questions as to liability of all parties herein for the payment of the fee of the Special Master.”

No notice of appeal from that final judgment was served or filed by the Government until November 28, 1958. It will be noted that the notice of appeal filed by the Government expressly excepted the Order with respect to the fees of Special Master. Defendant Pague was in no way before the Court at the trial of the action against Century Investment Corporation, which occurred September 15, 1958. That was solely a matter between the United States and Century Investment Corporation (Tr. 134). No appeal having been taken from the final judgment of the lower Court dismissing defendant Pague by final judgment until long after the expiration of the sixty day appeal period, the appeal of the Government with respect to defendant Pague was untimely and ineffectual.

Respectfully submitted,
 LYCETTE, DIAMOND & SYLVESTER
 and LYLE L. IVERSEN
 Attorneys for Appellants
 Century Investment Corporation
 and Virgil J. Pague

Office and Post Office Address:
 400 Hoge Building, Seattle 4, Washington



In the United States Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION, APPELLANT

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DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

Upon Appeal From the United States District Court for the
Western District of Washington, Northern Division

REPLY BRIEF FOR THE UNITED STATES,
APPELLANT

PERRY W. MORTON,

Assistant Attorney General.

CHARLES P. MORIARTY,

*United States Attorney,
Seattle, Washington.*

JOSEPH C. MCKINNON,

*Assistant United States
Attorney,
Seattle, Washington.*

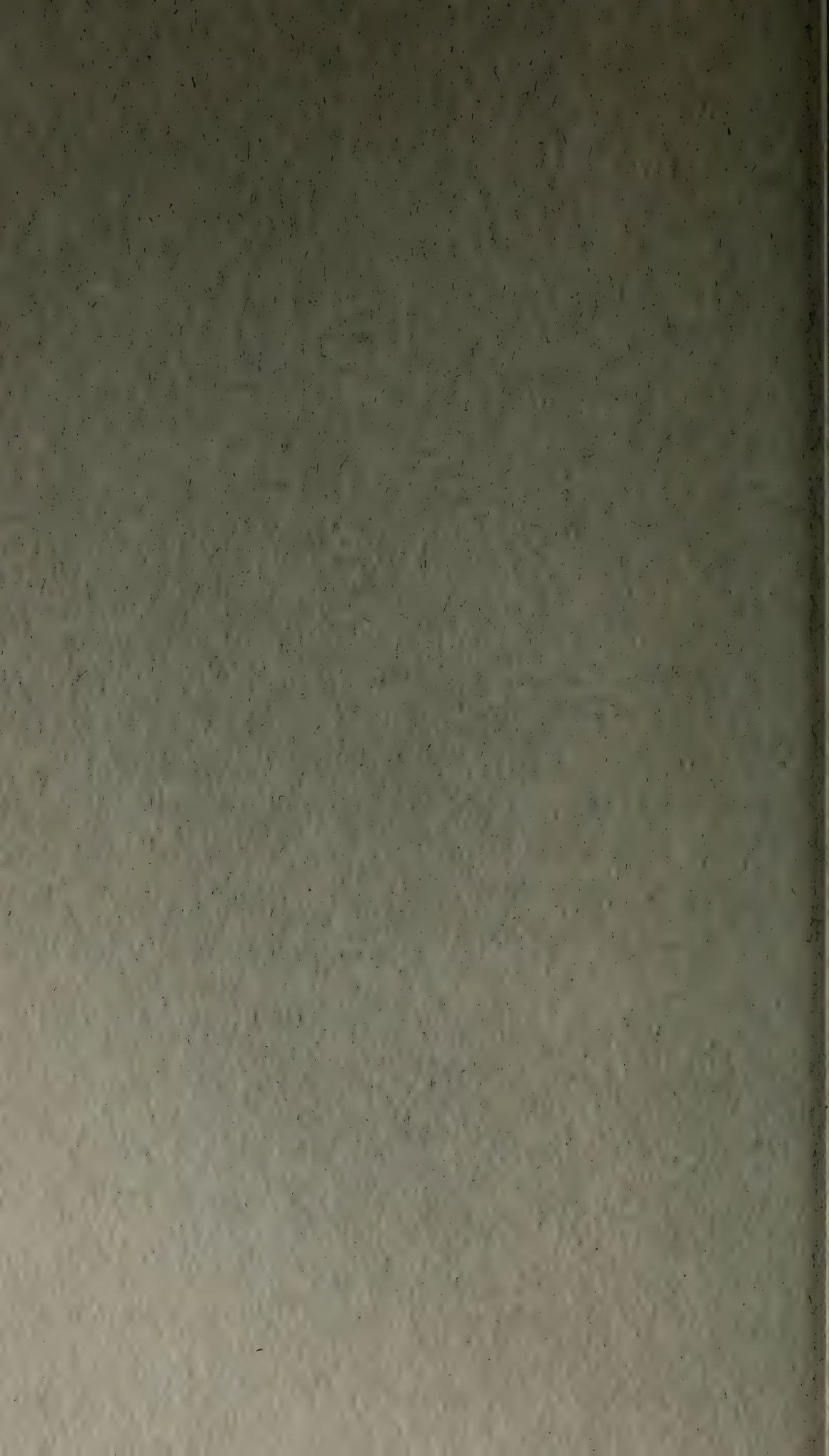
ROGER P. MARQUIS,

HAROLD S. HARRISON,
*Attorneys,
Department of Justice,
Washington 25, D. C.*

FILED

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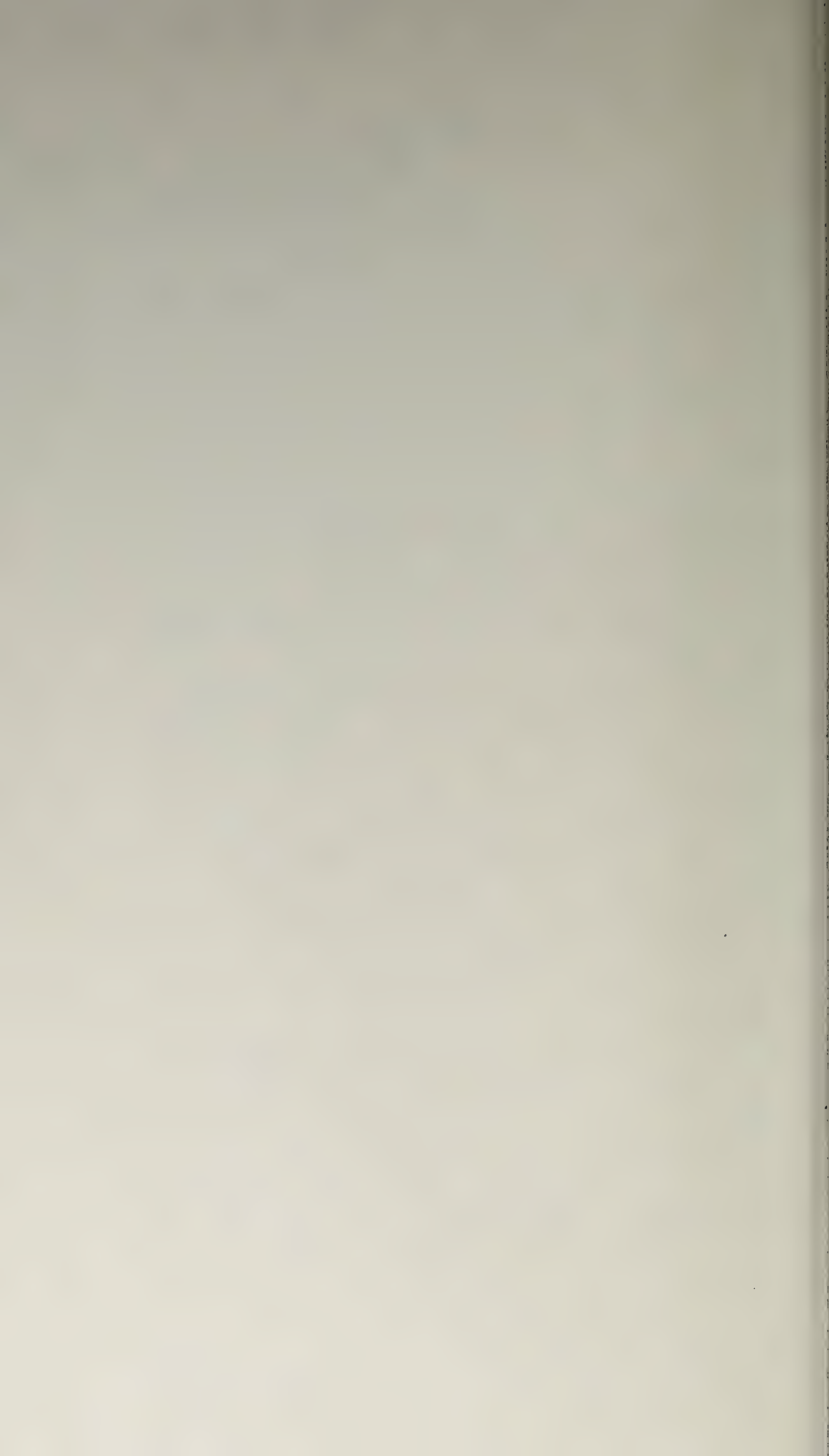
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16360

CENTURY INVESTMENT CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, AND DON S. GRIFFITH,
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EDWARD R. ESTER, ET AL., APPELLANTS

v.

DON S. GRIFFITH, SPECIAL MASTER, APPELLEE

Upon Appeal From the United States District Court for the
Western District of Washington, Northern Division

REPLY BRIEF FOR THE UNITED STATES,
APPELLANT

I

THIS COURT HAS ALREADY DETERMINED THAT
THE GOVERNMENT'S APPEAL WAS TIMELY FILED

The defendants would have it appear that the Gov-
ernment's appeal came too late (Century Answering

Br. 9; Ester Answering Br. 4, 11-16). This Court has already decided this question and defendants' arguments here amount to a second petition for rehearing. In its order opinion dated March 30, 1959, this Court stated flatly in this connection that "The notice of appeal was timely filed." By order filed April 15, 1959, this Court denied a petition by defendants for reconsideration of their motion to dismiss a portion of the Government's appeal. Accordingly, timeliness should no longer be an open issue in this case. Moreover, the want of any merit in such contention is readily shown. In this connection the United States adopts and incorporates herein by this reference its "Response to Motion to Docket and Dismiss Portion of Appeal of Cross Appellant, United States of America" dated February 16, 1959, and filed in this Court February 18, 1959. In line with pertinent opinions of the Supreme Court there cited, this Court properly disposed of the defendants' challenge to the timeliness of the Government's appeal in the instant case for the reasons stated in the Government's response to the defendants' motion to dismiss.¹ While at the July 10-11, 1958, hearing the District Court stated with respect to a draft of its order dismissing the individual defendants "What the Court

¹ This Court has also repeatedly noted the need for the "express determination" and the "express direction" called for by F.R.Civ.P., Rule 54(b), in multiple claims cases. E.g., *Burkhart v. United States*, 210 F.2d 602, 605 (1954); *Glen Falls Indemnity Co. v. American Seating Co.*, 248 F.2d 846, 848 (1957); *Island Service Company v. Perez*, 255 F.2d 559, 561 (1957); *Gilbertson v. City of Fairbanks*, 253 F.2d 231, 232 (1958).

intended so far as these defendants are concerned is certainly a final judgment" (R. 131; and see Century Answering Br. 9), the District Court denied an express determination pursuant to Rule 54(b), F.R. Civ.P., and stated the belief that any appeal should follow the trial of the case against the Century Investment Corporation (Affidavit of Harold S. Harrison dated February 16, 1959 filed in this Court February 18, 1959).

II

THE GOVERNMENT'S PRESENT APPEAL IS NOT PRECLUDED BY THE "LAW OF THE CASE", "RES JUDICATA" OR ANY OTHER PRINCIPLE OF LAW

Here, as in the matter of the special master's fee and expenses (see Brief for the United States, Appellee pp. 14-15), the defendants would have it appear that the United States is precluded from prosecuting its present appeal (Century Answering Br. 3-8; Ester Answering Br. 4-9). The defendants misapply the principles upon which they rely.

The District Court did not purport to dismiss the individual defendants from this case until after the remand by this Court on the prior appeal in No. 15219, *Century Investment Corporation v. United States*, 250 F.2d 139 (C.A. 9, 1957), cert. den. *sub nom. Ester, et al. v. United States*, 356 U.S. 950. Legal principles demonstrating the erroneous nature of the judgment purporting to dismiss the individual defendants can properly be relied upon whether or not such principles have been previously asserted as to other and earlier actions of the trial court.

As an appellee on the prior appeal, the United States did invoke legal principles presently relied upon (e.g., cf. Brief for the United States, Appellee in No. 15219, pp. 32-34 and Brief for the United States, Appellant in No. 16360, pp. 14-22). What the defendants ignore is the important fact that this Court disagreed with the District Court's notion that the defendants were not trespassers by reason of any alleged failure by the United States to pay taxes (see Brief for the United States, Appellant in the instant case, pp. 14-15). The fact that, in the view which it took of the case on the earlier appeal, this Court did not find it necessary to do other than to indicate its disagreement with the notion of the District Court (*ibid.*), by no means precludes the United States from relying upon established principles previously advanced in demonstrating the reversible nature of the District Court's subsequent error in purporting to dismiss the individual defendants.²

² Since in their arguments in this connection some of the defendants quote language from this Court's opinion on the earlier appeal which includes the following: "There is, in our case, no proof or finding that the conduct of Barrett, Owens or Ester was fraudulent in any respect. Nor is it shown or found that they did anything to induce Century to breach its contract" (Century Answering Br. pp. 3-4; 250 F.2d at p. 143), we believe it appropriate to invite the attention of this Court to subsequent statements by the trial court as follows (R. 100-102):

* * * I think the Court [District Court] made it plain to Counsel that the Court did not regard the entity of Century of sufficient independence of the parties who formed it or of the persons who knew in fact of what the contract was and took their rights in the property subject to the contract and therefore were bound by

In any event, the very authority relied upon by some of the defendants in this respect (Century Answering Br. p. 4) demonstrates the inapplicability here of the "law of the case" doctrine sought to be invoked by the defendants. Thus in 3 Am. Jur. 549 it is expressly noted in footnote 5 that "Only such questions as are before an appellate court and are decided by it become the law of the case by force of its judgment (citing authorities)". The text on the page cited by the defendants (3 Am. Jur. 549) goes on (pp. 549-550): "* * * This doctrine [law of the case rule] does not extend to new points presented upon a second appeal (citing authorities) or to points which the court, on the prior appeal, expressly re-

the conditions of the contract, nor such corporate entity sufficiently clear to shield the other defendants from liability.

* * * *

I would like to add this to it, that since each and every one of the defendants dealt with this property with the contract obligations originally made by Century in mind, with full knowledge of it, that it was wholly inequitable and unconscionable for them to disregard the rights of the United States of America under the Century contract, of all of the terms of which they were well aware, and took the property interests they had purchased by succession at their peril. * * *

* * * *

The Court, after the Special Master's report, thought that the obligation which was imposed upon each and all of the parties would not be reasonably compensated by a sum that would be comparable to the amount of rentals and profits that they had received and realized by reason of their equitable wrong, and it is apparent to me that the Court [Court of Appeals] through Judge Hamley or otherwise did not get the true picture. * * *

served, or left open for future litigation (citing authorities).”³ The dismissal of the individual defendants is a new point presented on a second appeal and so it comes squarely within the language just quoted. Moreover, since this Court expressly left open the liability of the individual defendants, it appears that the instant case comes as well within the injunction that the law of the case doctrine does not extend “to points which the court, on its prior appeal, expressly reserved, or left open for future litigation” (3 Am. Jur. at p. 550).

In any event, the defendants have at least overlooked—if they did not ignore—the basic distinction between a reversal and an affirmance of a judgment in this respect. Thus the first headnote of *Mutual Life Insurance Co. v. Hill*, 193 U.S. 551 (1904)

³ Unmentioned by the defendants, their cited authority also goes on to note that (3 Am. Jur., Appeal and Error, Sec. 995, p. 550): “There is, however, some authority from other jurisdictions to the effect that an appellate tribunal is bound by its decision on a prior appeal, or error proceeding, only upon the points distinctly made and determined, and not at all upon points which might have been raised, but were not (citing authorities). And in some jurisdictions it has been held that the rule is that an appellate court is bound by a decision on a prior appeal only upon points necessary to a determination of the cause as it was then presented, and that upon questions not considered and not necessarily involved, it is not conclusively bound, even though they might have been properly considered and determined on such prior appeal (citing authorities).” In giving this Court only half of the picture, we submit that the defendants have demonstrated the truthfulness of the observation by Mr. Justice Frankfurter that “Quoting out of context is one of the most frequent and powerful modes of misquotation.” *Palermo v. United States*, 360 U.S. 343, 352 (1959).

states the principle concisely: "A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." In the text of that opinion the principle is spelled out as follows (193 U.S. at pp. 553-554) :

When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the

record and have not already been decided are open for consideration.

Citing numerous authorities in support, this Court has similarly held that “* * * a judgment of reversal by an appellate court is an adjudication only of matters expressly discussed and decided, which become the law of the case in further proceedings on remand and re-appeal. (citations omitted).” *Hansen & Rowland v. C. F. Lytle Co.*, 167 F.2d 998, 999 (C.A. 9, 1948).⁴

The answering brief filed on behalf of defendants Ester, Barnett and Owens adds little worthy of note since in this respect it consists largely of quoting from the opening brief as appellants filed on behalf of these same defendants (cf. Ester Answering Br. 7-9 and Ester opening Br. 7-8).⁵ Since the Govern-

⁴ It should be noted that *Cherokee Nation v. Kansas Railway Co.*, 135 U.S. 641 (1890), and *United States v. Lee*, 106 U.S. 196 (1882), cited by the defendants to support the district court's ruling on the merits (Century Answering Br. p. 5) are entirely inapposite. This is so because under the Declaration of Taking Act (Act of February 26, 1931, Ch. 307, 46 Stat. 1421; 40 U.S.C. sec. 258a) title expressly vests in the United States upon the filing of a declaration of taking and the deposit in the court of the amount of estimated compensation stated in the declaration. Under the provisions of the Act compensation would thereafter be ascertained and awarded in the proceeding in which the declaration of taking was filed. And, as has heretofore been noted, payment of the taxes was assured by virtue of the so-called Tucker Act (see discussion and authorities cited in Brief for the United States, Appellant, pp. 15-17).

⁵ Care should be exerted in reading the cited briefs since where these defendants would have it appear that they are quoting from the record, such is not the case. *Ibid.* Indeed,

ment has heretofore treated the contentions there asserted insofar as they relate to part of the issues presented in the instant cross-appeals (see Brief of the United States, Appellee, pp. 14-15), we pause only to note that the fact that counsel for the United States advanced certain principles of law on behalf of the United States as an appellee on the prior appeal (No. 15219) does not preclude them from relying upon the same established principles of law with respect to subsequent error of the District Court. Nor do the authorities cited by the various defendants purport to hold to the contrary.

Similarly, the fact that the erroneous dismissal of the individual defendants resulted in their not participating in the September 1958 proceedings by no means precludes the United States from relying upon findings of fact and principles of law which demonstrate that the United States proved a right to substantial damages against the individual defendants in this case (cf. particularly Ester Answering Br. 5-6, and the twice repeated charge of "absurdity" there appearing (p. 5)). Since the Government has demonstrated the error of the District Court's conclusion that the United States did not have the exclusive possession of the land during the time here pertinent (Brief for the United States, Appellant, pp. 14-22), upon which this contention by the defendants is bot-

on page 7 of their answering brief, these defendants (Ester, Barnett and Owens) go right on after a blocked quotation from the record in the identical blocked form with no asterisks or other sign to indicate that the remainder of the blocked material is from one of their earlier briefs in this Court.

tomed (Ester Answering Br., p. 6), we feel it unnecessary to labor this matter. Since we believe that we have thus shown that the District Court's judgment was plainly erroneous in law, the doctrine of "law of the case" should not be applied to perpetuate that error. *United States v. Fullard-Leo, et al.*, 156 F.2d 756, 757 (C.A. 9, 1946), affirmed 331 U.S. 256 (1947).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be reversed and the case remanded for the determination of damages in favor of the United States and against the individual defendants.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

CHARLES P. MORIARTY,
*United States Attorney,
Seattle, Washington.*

JOSEPH C. MCKINNON,
*Assistant United States
Attorney,
Seattle, Washington.*

ROGER P. MARQUIS,
HAROLD S. HARRISON,
*Attorneys,
Department of Justice,
Washington 25, D. C.*

NOVEMBER 1959

United States Court of Appeals
For the Ninth Circuit

CENTURY INVESTMENT CORPORATION, *Appellant,*
vs.

UNITED STATES OF AMERICA, and DON S. GRIFFITH,
Special Master, *Appellees.*

VIRGIL J. PAGUE, *Appellant,*
vs.

DON S. GRIFFITH, Special Master, *Appellee.*

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APPEALS AND CROSS-APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HON. JOHN C. BOWEN, *Judge*

ANSWERING BRIEF OF JOINT APPELLEES, EDWARD
R. ESTER, *et al., TO BRIEF FOR UNITED STATES,*
APPELLANT, and MOTION TO DISMISS, and

REPLY BRIEF OF JOINT APPELLANTS, EDWARD R.
ESTER, *et al., TO ANSWERING BRIEF FOR UNITED*
STATES, APPELLEES.

ARTHUR G. BARNETT

McMICKEN, RUPP & SCHWEPPE

Attorneys for Edward R. Ester,
Arthur G. Barnett and Donald
F. Owens, Appellants-Appellees.

1304 Northern Life Tower
Seattle 1, Washington

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ARTHUR G. BARNETT

McMICKEN, RUPP & SCHWEPPE

*Attorneys for Edward R. Ester,
Arthur G. Barnett and Donald
F. Owens, Appellants-Appellees.*

1304 Northern Life Tower
Seattle 1, Washington

NOTE: Since the Government did not give a separate answering brief to the separate brief of Edward R. Ester, Arthur G. Barnett and Donald F. Owens, but combined it in one brief, Ester, *et al.*, use one brief to make their answer as Appellees and their Reply as Appellants.

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**ANSWERING BRIEF OF JOINT APPELLEES, EDWARD
R. ESTER, ARTHUR G. BARNETT AND DONALD F.
OWENS TO BRIEF OF THE UNITED STATES AS
APPELLANT¹**

OPINION BELOW, JURISDICTION

There was no opinion below inasmuch as this Court's remand gave discretion to the trial court to dispose of the case "as may be thought proper" (250 F.2d 139,

¹The government appeals from an order granting summary judgment (R. 22) in favor of the individual defendants, and dismissing them from the action, and from an order denying reconsideration thereof (R. 47). Although the government also appeals from a \$15,000.00

144). So the trial court accordingly granted motions for summary judgment after construing its own earlier findings, and dismissed the action as to the individual defendants. As shown herein (*infra*, pp. 11-15), the order granting summary judgment (R. 22) was intended to be, and by the terms of the order denying reconsideration was expressly re-affirmed to be, a final decree (R. 47).

For the purpose of this brief the statement of jurisdiction and opinion below contained in the brief of appellants Barnett, Owens and Ester, previously filed, is adopted.

STATEMENT

The part of the government appeal (Br. 10(a) 1, Specification of Errors) which involves Barnett, Owens and Ester is that

“The District Court misconstrued the opinion and mandate of this Court as requiring the dismissal of the individual defendants. As a result of such misconstruction, despite its own repeated recognition of the full knowledge of all of the individual defendants of the removal requirement and its belief that the individual defendants were ‘bound by the conditions of the *contract*’ (R. 101), the District Court dismissed the individual defend-

judgment in its favor against Century, this does not concern Barnett, Owens and Ester. It is extremely unfortunate, however, that the government commingles the defendants and the issues.

This case was heard in a former appeal, No. 15219, and the printed record thereof has been designated a part of the record on appeal in the instant case (R. 172). It will be referred to herein as (P.R.) while reference to the current record will be shown as R.).

ants from the action. Its doing so constituted clear error.” (Emphasis added)

The opinion of this Court is set forth in 250 F.2d 139. The statement of the case in the appellants’ brief of Barnett, Owens and Ester sets forth quotations from said opinion (Br. 3) and said statement is adopted. This Court discusses and rules upon the *contract* issue and disposes of the issue by stating that Barnett, Owens and Ester “*were not privy to the contract*, they were no more amenable to specific performance (and hence to an equitable substitute for specific performance) than they were to damages for breach of contract.” (250 F. 2d 139, 142.)

This Court held that the judgment against Barnett, Owens and Ester could not be sustained on any of the theories of contractual liability urged. It was held that mere knowledge was not sufficient. There was no proof or finding to support any liability on the contract (250 F.2d 139, 143). The government in its statement and throughout its brief tries to revive this issue.

The contract issue is the only point used as a basis for its specification of error as to Barnett, Owens and Ester, but the government also attempts in its statement to reopen the matter of payment of taxes. These appellants adopt the statement of the case appearing in the brief of Century Investment Corporation and Virgil J. Pague in Answer to Brief for United States, Appellant, as to this issue.

SUMMARY OF ARGUMENT

The trial court committed no error in granting summary judgment in favor of the individual defendants, dismissing them from the action, and in denying the plaintiff's motion for reconsideration because it acted pursuant to the authority vested in the remand of this Court which was to construe its findings in the record or by proceeding to another trial, "as may be thought proper." The government has failed to take a timely appeal.

ARGUMENT

On March 30, 1959, this Court entered an order herein in which it reviewed the history quoting therefrom:

"Upon remand, the trial court may determine the question of liability on the theory of trespass of implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred or monetary damages sustained by the government." (250 F.2d 139, 144)

The government's effort to reopen the contract issue in its Specification of Error (Br. 10(a) 1), and its effort to reopen the issue of trespass and implied contract to pay rent (at least as to Barnett, Owens and Ester as distinguished from Century) both fail because all the issues are settled by the law of the case and by the action of the trial court, pursuant to the remand.²

²We find it hard to follow the government's argument which "flits" back and forth between the individual defendants and the corporation

The government is actually attempting to argue an appeal on all the issues from which it did not appeal in the first trial. The earlier findings which the trial court construed were unchallenged by the plaintiff. The absurdity of the government's argument as to Barnett, Owens and Ester appears from its sub-title, to-wit:

“(1) The government proved its right to substantial damages against the individual defendants.” (Br. 11)

There was no opportunity given the government to prove such a right against the individual defendants.

There was such an opportunity given on the new trial ordered as to the corporate defendant on the issue of damages only. No findings, no trial, and no judgment based on said findings can in law possibly affect the individual defendants. They were dismissed weeks prior to the trial as to Century; they were not even present at the trial (*infra*, p. 11(1), (5)). This commingling of the defendants and the commingling of the issues and the attempt to revive all the issues settled by the opinion of this Court in the former appeal is the best proof that there is no merit whatsoever to the claim of error.

We quote one more absurdity:

“In view of these findings it necessarily follows that the District Court's dismissal rested only on its theory that there had been no trespass.” (Br. 22)

defendant. All the old arguments, in fact even most of the quotations and some citations appearing in the government brief (Br. 12-16) appear in the answering brief of the government in the former appeal. (Ftn. 8 p. 15; p. 16.)

1. "... these" findings cannot possibly apply to the individual defendants, again because they were not parties to the trial, etc.

2. The trial court's dismissal rested not on "these findings" but in construing its own original findings to be: that the government had failed to prove the allegations of its complaint that it had the right to exclusive possession of the land owned by the individual defendants; therefore the government was not entitled to "any relief" (R. 21, line 6) based on such claimed right. This quotation is from a stenographic transcript of the trial court's oral opinion when it announced the findings at the conclusion of the original case in 1956 (R. 19-21). The trial court reviewed this transcript during the arguments on the motions for summary judgment, and suggested that this excerpt be filed (R. 103). It is endorsed "Filed July 10, 1958." The government says this Court left open the possibility of recovery under trespass and implied contract (Br. 6) but neglects to set forth the complete statement of this Court which followed these suggested possibilities, namely,

"This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these Appellants owned the houses. Barnett, Owens and Ester argued at the trial court so held in the supplemental findings of fact." (250 F.2d 139, 143)

This Court left it to the trial court to determine the question of liability on these two theories,

"... either by contruing the findings in the record or by proceeding to another trial, as may

be thought proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred for monetary damages sustained by the Government.” (250 F.2d 139, 143, 144)

Upon remand, the trial court stated and reiterated time and time again:

“ . . . the court does grant the motion for summary judgment in favor of defendants because the court has already construed its findings and in pursuance of the Appellate Court’s permission does now again construe them to mean, as the court intended at the previous trial to rule, that the Government never did have any right of possession and therefore had no right to an action based on any theory of wrongful interference with that possession such as an action for trespass, and further because the Appellate Court in reversing this court said in effect, among other things, that, not only as to the trespass basis of action but also as to a suggested possible implied contract basis of action, plaintiff United States would have no such right against these individual natural defendants if the court found, which this court did and does, that the government had no right to exclusive possession and further because the Appellate Court held that there was no contract obligation on the part of any defendant in this case except the defendant corporation Century Investment Company.” (R. 124)

“The rule is firmly established that the decision of an Appellate Court on appeal or writ or error is controlling upon the court below after the case has been remanded, and is equally controlling upon a

second appeal or writ of error in the same case . . . the rule itself has been iterated and reiterated by the Supreme Court and by this court . . . ”

City of Seattle v. Puget Sound Power & Light Co., 9th C.C., 15 F.2d 794, 795, certiorari den. 269 U.S. 565.

(The court then considered defenses not foreclosed by the former decision.)

“The rule applicable to the case, as now presented is stated in the opinion of the Supreme Court in *Roberts v. Cooper*, 20 How. 481, 15 L.ed. 969, as follows:

“ ‘It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be heard or examined upon the second.’

“This rule has been consistently observed by this court. *Montana Mining Co. v. St. Louis, etc., Co.*, 147 Fed. 903, 78 C.C.A. 33; *San Pedro, L.A. and S.L.R.C. v. Thomas*, 187 Fed. 790, 109 C.C.A. 638.

“After rendering its opinion on the former hearing of the case, this court considered and denied an application for a rehearing and now the court can do no less than to declare the litigation terminated, subject to any right of review which the government may have to apply for a review of the case by the Supreme Court.” *United States v. Axman* (9th C.C.) 193 Fed. 644.

The opinion in a former appeal which reversed

a judgment denying damages for breach of contract precluded attack on contract at second trial on grounds not previously argued; and concluded even on matters which might have been included. *Sorensen, et al., v. Pyrate Corporation*, 65 F.2d 982 (9th C.C.) cert. den., 290 U.S. 689.

“Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but fail to take advantage of the opportunity within the time prescribed by Rule 73-a. Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear.” *Perrin v. Aluminum Co. of America*, 197 F.2d 254, 255 (9th C.C.)

THE GOVERNMENT'S APPEAL IS NOT TIMELY

The government appeal filed November 28, 1958, from the order entered July 11, 1958, granting the motions of Barnett, Owens and Ester for summary judgment (R. 22-24), and from the order entered August 22, 1958, denying re-consideration of said motions (R. 47-48), was too late because it was filed 94 days after August 22 instead of within 60 days (Rule 73(a), F.R.C.P.).

The printed record now makes clear that the said summary judgment dismissing the action as to Barnett, Owens and Ester was a final action. This Court did not have the printed record before it when considering a prior motion to dismiss.³

ARGUMENT

The intention of the court at the time the order was entered is controlling. We have already fully proved that Barnett, Owens and Ester were not parties to the new trial, hence not bound by the findings thereon, and, in law, consequently not bound by any judgment based on said findings. Here is more proof:

(1) The trial court wrote in its own handwriting in the findings, paragraph XVIII:

“That in these Findings this Court does not deal with the evidence or subject of trespass and/or implied contract because the only defendants concerned with those issues have heretofore been dismissed from this action and because as to trespass that was decided against plaintiff and in favor of defendant at the first trial and no evidence in the

³The court denied the motion by order dated March 30, 1959. The government argued that the judgment was the final order.

record at this time justifies a different result.”
(R. 73)

(2) The Court also said:

“It is not positive error, it seems to me, to say ‘adjudged’ when all you do is order. It cannot mean any more than it can possibly mean under the law mean, and if under the law it possibly can be a judgment in order to effectuate the Court’s intention, then it may be. What the Court intended as far as these defendants are concerned is certainly a final judgment. It has only one condition which does not apply to the ~~109~~ issues ruled upon. It is a specific reservation of the right to determine all the original parties or all the parties before the Court when the Special Master did the work which resulted in his making his final report to see if there is any ruling in that connection that should be made in the future affecting these dismissed defendants. One reason for reserving that condition is because the Special Master was not represented by Counsel at yesterday’s hearing, and I feel it is only appropriate and necessary that the Special Master be present and be heard, to give him a right to be heard through Counsel. So it is more with reference to saving the status as to that Special Master’s right for a time when we may all be present and be considering that subject properly. However, I think that issue has nothing to do with these important ones here. That is merely an incidental relating to costs and expenses of the action. Mr. Doolittle?” (R. 131-132)

(3) The summary judgment was ordered “entered” (R. 133). It is dated and filed July 11, 1958 (R. 22-24).

(4) The docket shows the trial got “under way as

to Century Investment Corporation only; *this Court having heretofore dismissed the other defendants*” (R. 49-50) (Emphasis added).

(5) At the new trial as to Century the trial court made it emphatically clear in an exchange (R. 138-139) with the governmental counsel who claimed that a proffer should in “the view of the Department of Justice apply to all the defendants because *there has never been a final judgment* dismissing them, . . .” (Emphasis added) (R. 138).

The Court replied:

“That is contrary to my understanding. My understanding is that the defendants, all except this defendant Century, have been formally dismissed by an order entered within the last four to five weeks.

MR. MCKINNON: My feeling as Counsel was that the Court would have that belief. That was the reason I suggested entering the stipulation in the record rather than making the formal and lengthy proffer of proof.

THE COURT: It was that order to which the Court added the words ‘at the,’ if you remember, today.

MR. MCKINNON: Yes, your Honor, that would be the order of July 11th.

THE COURT: That was the order dismissing the defendants.

MR. MCKINNON: That’s right.

THE COURT: And I do not now understand as Counsel speaking does that they are any longer in the case, the defendants other than Century, except for the purpose of the Court’s authority and

duty to award compensation and relief to the Special Master . . .”

It is noted that the government was thus aware of and alerted to the necessity of filing any contemplated appeal within 60 days of August 22, 1958.

The civil docket entries under Rule 79(a) having been designated and certified, show on July 14, 1958, the entry of a summary judgment dismissing the individual defendants; and the entry on August 22, 1958, shows the entry of an order denying the motion for rehearing the motions on summary judgment.

“There it is apparent from the entry that the plaintiffs were denied any relief and the substance of the judgment is shown.” *U.S. v. Cook* (9 CC) 215 F.2d 528, 530.

The government was denied any relief and the action and the individual defendants were dismissed by the order granting summary judgment. A special master’s fee was a discretionary matter at that time with the court and not connected with any claim for relief by the government.

A summary judgment presupposes that there are no triable issues of fact. *Lindsey v. Leavy* (9 CC) 149 F.2d 899, cert. den. 326 U.S. 783.

“A reservation to make further orders does not mean orders inconsistent with the finality of the judgment. Such orders may well have to do with costs or . . .” *Johnson v. Wilson*, (9 CC) 118 F.2d 557, 558.

It has been held that a summary judgment was appealable despite the reservation to make further orders

and, in denying a motion to dismiss the appeal, it was stated:

“Assuming that the other requirements are met, a ‘reservation to make further orders does not mean orders inconsistent with the finality of the judgment’,” *Pioche Mines Consol. v. Fidelity-Philadelphia Tr. Co.* (9 CC 1951) 191 F.2d 399, ⁴⁰⁰.

THE CIVIL DOCKET ENTRY WAS A FINAL JUDGMENT

When Rule 58 of the Federal Rules of Civil Procedure is complied with by the entry of a judgment in the civil docket showing the substance of the judgment, and it is the intent of the court that it is a final judgment, then the time to appeal starts to run under Rule 73(a). *U.S. v. Schaeffer Brewing Co.*, 356 U.S. 227 (1958).

In *Erstling v. So. Bell Tel. & Tel. Co.*, 255 F.2d 93, 95 (5 CC 1958), the court dismissed a complaint for failure to state a cause of action. The clerk’s entry on the civil docket was:

“1957 . . . July 12 Order granted motion to dismiss with prejudice to plaintiff.”

Later an instrument styled Final Judgment was signed by the district judge and recited that the plaintiff take nothing. It was held that the entry of July 12, 1957, is the final judgment from which an appeal will lie, the court stating that no form of words is necessary to evidence a rendition of a judgment. Citing *U.S. v. Schaefer Brewing Co.*, 78 S.Ct. 674, 356 U.S. 227, the 5th Circuit said:

“If the language used by the court clearly evidences the judge’s intention that it shall be his final act it constitutes a final judgment, and when such intention has been so evidenced and the docket entry has been made a final judgment has been pronounced and entered and the time to appeal starts to run. The later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal. Such are the principles applied here as announced in the *Schaefer* opinion.”

CONCLUSION

The government appeal was not timely.

The recitation in the judgment that it was a final judgment was surplusage as to Barnett, Owens and Ester. There could not be and it was not the intention of the trial court to have two final judgments. Furthermore, the order granting summary judgment on its face was and is in law final. The judgment was altered by the court’s own handwriting to show that even the order on the master’s fee stood alone (Doc. 229, p. 2, lines 19-27). It was final and subject to execution. The judgment was based on findings as to Century and could not in law be binding on persons dismissed and no longer parties to the merits; therefore it was not and could not be a final order as to parties finally dismissed. The reserved matter of the master’s expense was eliminated from the judgment; the order awarding, and authorizing execution upon, the master’s fee stood alone (except for an unnecessary confirmation).

**REPLY OF BARNETT, OWENS AND ESTER, APPELLANTS,
TO ANSWERING BRIEF OF UNITED STATES,
APPELLEE⁴**

(a) The individual defendants under the law of the case, and because of their dismissal following the remand, are, in law, not “wrong.”

The breach of contract was the legal wrong. Barnett, Owens and Ester by the law of the case had no part in that wrong. As to them the government is in the wrong. It did not prevail. The contracting party was wrong in its breach. To paraphrase the government’s statement: there being no wrong on the part of Barnett, Owens and Ester no part of the master’s fees and expenses are chargeable to them.

(b) The individual defendants Barnett, Owens and Ester were using land owned by them. The government claimed the exclusive use of the land; it failed to prove its right thereto. The law of the case in view of the dismissal of the individual defendants is that they committed no wrong in using their own property. The government prayed in its complaint for this appointment:

“An accounting by all parties of the funds collected by said defendants from tenants or from other sources by reason of the unauthorized use of said temporary buildings and the land upon which they are situated.” (P.R. 9, item 4)

⁴Again the government commingles the individual and corporate defendants. Its briefs should be stricken. The government states the question as:

“where a special master has been appointed in an equity proceeding as a result of *defendant’s* wrongful use of property, may the appointing court properly charge a part of the master’s fees and expenses to the defendants.” (Emphasis added.) (Br. 2.)

Being solely responsible for this expense the government should pay it.

(c) The government says it has paid \$645.75 of the master's fees and expenses and then in the next breath argues that such expenses are not properly chargeable against it.⁵

(d) If the master's work had to be considered in the new trial then the costs are part of *that* trial. And it has already been demonstrated that Barnett, Owens and Ester had no part in that trial.

(e) We do not understand the government's summary of argument (Br. 9, item 1) that the defendants are responsible for the situation resulting in the appointment of the special master. All parties claimed an erroneous reference. The theory of damages was by the law of the case held in error. The government was responsible for, and insisted upon, an accounting and misled the trial court on the wrong theory of damages.

(f) This Court reversed the judgment against the individual defendants for the master's fee. It was a

⁵The government calls attention to what it calls an erroneous charge in the Ester brief: that the United States "to this date has not paid the master." The answer to this is that there is no record of any payment in the court docket. The government statement is *dehors* the record. *Dehors* the record Barnett, Owens and Ester state that the clerk has no knowledge of the payment. The Assistant United States Attorney who tried the case says it was paid and that Barnett, Owens and Ester could have telephoned to find out. The payment was effected April 21, 1959. Is this the amount ordered to be paid by plaintiff in the judgment entered April 26, 1956, and not appealed from by the plaintiff? (P.R. 117, lines 3 and 4. Should a phone call have been made every day from April 26, 1956, to April 21, 1959? It is still claimed the government has not paid the 1956 judgment from which it did not appeal! It has paid the similar amount ordered to be paid by it September 29, 1958 (R. 62, lines 15-17).

judgment and not a cost bill. The government did not petition for certiorari. It is demonstrated that the government will pay an honest bill if ordered so to do by a judgment of the federal courts—especially where it does not appeal.

(g) Where parties are dismissed, and where in law they are guilty of no wrong, it is unjust to charge them with expenses incurred by reason of the wrongful insistence of the expense by the losing party—in this case the government.

(h) The government argues that this is an equity proceeding. As to Barnett, Owens and Ester there was no proceeding after their dismissal. They were dismissed as surely as though the appellate court had so directed.

(i) It is especially unfair to have made the judgment joint and several. This is a great mystery. For some reason the trial court did not assess this expense wholly against the government (which is responsible for all of the troubles of Barnett, Owens and Ester), or against Century which breached the contract. Instead, the parties who prevailed on appeal, and who moved for dismissal at the close of the original trial, are charged jointly with an expense that was reversed as to them.

Although the government cites *Dyker Bldg. Co. v. United States*, 182 F.2d 85, 89 (C.A. D.C. 1950) to the effect that the trial court has discretion in an equity proceeding as to the master's costs, the United States in that case was charged with one-half of the master's

fees, yet the government argues herein that it is immune from such expense. In the instant case it has recognized its liability for the amount ordered paid. It can and should be ordered to pay all the master's expenses since these services were not even necessary. The rents of the buildings could not in law be used as a basis for damages against the individual defendants.

An appellate court always has jurisdiction to set aside a master's fee when there is an abuse of discretion. There is such an abuse here. There was an erroneous reference objected to by the individual defendants, and the matter has already been fully argued before this Court in the prior appeal. The accounting was poor and discriminatory and the charges excessive. It should not be necessary to re-argue all the matters fully briefed by appellants Barnett, Owens and Ester in the prior appeal on the master. Contrary to the impression given by the government (Br. 15) this Court did reverse the judgment against the individual defendants for three-quarters of the master's fees.

The government itself is voluntarily removing the immunity embarrassment as witness its payment in this case. This Court should follow the rule established in the Second Circuit.

No. Atlantic & Gulf S.S. Co. v. United States (2d C.A. 1954) 209 F.2d 487. The appeal of the United States was solely to contest the allowance of certain expenses and costs under U.S.C. Title 28, Sec. 2412(b) "no other statute expressly providing for such allowance." The trial court had entered an order that the

United States pay the plaintiff's attorney \$395 expense of attendance and an attorney's fee of \$300 in connection with the taking of a deposition more than 150 miles from the courthouse. When costs were taxed by the clerk, the above items were disallowed but they were allowed as costs by order of Judge Conger. The clerk taxed attorney's docket fees in the sum of \$10 and \$20. The appellate court excluded the \$10 and \$20 attorney's fees as being within the exclusions of Sec. 2412(c). Regarding the attorney's fees and travel expenses the appellate court states:

“We think, however, that a distinction is to be drawn between attorney's fees in general which are paid attorneys in litigation with the government, and attorney's fees and expenses which were the basis for computing what was here allowed as costs in connection with the taking of the deposition in San Francisco. It was the government that gave the appellate notice of the taking of the deposition upon oral examination at a place more than 150 miles from the courthouse. Rule 12 of the Civil Rules of the District Court for the So. D. of New York provided, in so far as now pertinent, that ‘... the expense of the attendance of one attorney ... including a reasonable counsel fee ...’ ” should be paid by an appellee to take a deposition more than 100 miles from the courthouse.

The court noted that said district court rule was consistent with Rule 30(b), Fed. Rules Civ. Proc., and supplemented them; and that they are an example of a way in which the district courts may regulate their practice in accordance with Rule 83, Fed. Rules Civ. Proc. Rule 83 provides that each district court by a

majority of its judges may make rules governing its practice not inconsistent with the Fed. Rules of Civ. Proc. Rule 83 further provides: "In all cases not provided for by rule, the district court may regulate their practice in any manner not inconsistent with these rules."

The court concluded by holding that the United States "as a party desiring to take a deposition was subject to the same rules of procedure in respect thereto as any party." The court cited to *Bank Line v. U.S.*, 163 F.2d 133, 138, which states "it has been the policy of the American as well as the English courts to treat the government when appearing as a litigant as any private individual."

The United States, against strong and constant objections of these appellants, advocated that the appellants be compelled to make an accounting. The government attempt, erroneously as a matter of law, involved the trial court in a theory of damages under which the government should be allowed damages for the value of the buildings "on site." As a party litigant seeking affirmative relief calling for the exercise of judicial discretion in procedural matters under the local and federal rules of civil procedure the government in equity is liable for the master's fees and expenses thus incurred.

❧ The Federal Rules of Civil Proc. have all the effect of law. ❧ Barron and Holtzoff, Vol. I, page 233.

In *Ex parte Peterson* (1919) 253 U.S. 300 (Brandeis), Syl. (6) states:

“In the absence of any controlling act of Congress, the power to make a compulsory reference to simplify and clarify the issues and make tentative findings is possessed by the District Court inherently, at law as in equity.”

and, at page 315:

“As Congress has made no provision for paying from public funds either the fees of auditors or the expense of the stenographer the power to make the appointment without the consent of the parties is practically dependent upon the power to tax the expense as costs.

“Federal trial courts have, sometimes by general rule, sometimes by decisions upon the facts of a particular case, included in the taxable costs expenditures incident to the obligation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury. Equity Rule 68 provides for taxing the fees of masters and Rule 50 for the expenses of a stenographer.

“The power of the trial court to appoint a special master is inherent, Rule 53 merely serving to outline the procedure to be followed when the power is exercised” . . . Ohlingers Fed. Prac. Vol. 3-A, p. 233.

Effect of Reversal

The court of appeals, upon a petition for rehearing, directed the trial court to construe its findings, and that if said construction was as contended by Barnett, Owens and Ester, then there would be no liability upon them for trespass or reasonable rent. The trial court has followed this direction and dismissed these de-

fendants. The master's petition for an allowance as a matter of law should be construed solely against the United States rather than Barnett, Owens and Ester in order to be consistent with the reversal, and the remand. This is because the judgment for the master's compensation was reversed.

The district court orders dealing with the costs of a reference normally involve the exercise of a sound judicial discretion; hence, *in the absence* of an abuse of discretion or some other error of law, the following orders are not reviewable: orders determining the amount of the master's compensation . . . , what party or parties are initially responsible for payment and the time within which payment should be made, and what party or parties are taxed with the costs of reference 4. Moore Vol. 5 2d Ed. § 2926. It is an abuse of discretion to reinstate a reversed judgment against Barnett, Owens and Ester.

Appellate courts are generally not disposed to disturb findings in the matter of compensation for services of . . . masters (5) . . . unless injustice clearly appears, *Newton v. Consolidated Gas*, 259 M S 101.

A court whose judgment has been reversed or affirmed cannot rejudge that reversal or affirmance. *Davis v. Packard*, 8 Pet. 312, 8 L.Ed. 957.

“When a case has been once decided by this court on appeal and remanded to the circuit court, whatever was before this court and disposed of by its decree is considered as fully settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the

mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.”

Sanford Fork and Tool Co., 160 U.S. 247, 255, 40 L.Ed. 414, 416, 16 S.Ct. 291, cited and affirmed in

Eastern Cherokee v. U.S. (1912) 22⁵ U.S. 571², at 582, 56 L.Ed. 1212, at 1216.

Ayerigg et al. v. United States, 124 F.Supp. 416, is relied upon by the government as authority for the non-liability of the government for costs not otherwise allowed as a matter of law, and, specifically, for a master's compensation.

That action was based upon Private Law 35, passed by Congress April 21, 1949, 63 Stat. 1088. It conferred special jurisdiction upon the court to hear, determine and render judgment upon the claims of all persons damaged as a result of a flood which occurred December, 1937, in levee district No. 10, Yuba Co., California. The holding of the court is that since Private Law 35 did not provide for costs against the United States the motion for advances to the master is denied. It is obvious that the court did not and could not go beyond the bounds of the consent of the sovereign as set forth in *Private Law 35 which did not include costs or expenses*. The court dicta on a master's compensation being costs is not to be confused as a ruling that where the court appoints a master under Rule 53 of Fed. R.

of Civ. Proc., it does not have the inherent power to direct payment of compensation by the United States as a party.

In the cause now before the court the United States not only called for an accounting but it did not object to, nor appeal from the judgment against it to pay $\frac{1}{4}$ of the master's fee, in the amount of \$645.75. As long as the reversed judgment against the defendants for net rental profits was in its favor the government had little to lose; its conduct can and should be construed as a stipulation and consent to pay the master's fee and expenses as this Court may direct.

These appellants have paid the burdensome costs of two appeals. They do not expect to recover those "costs." It is unfair to construe the master's compensation as an excludable item of costs when it is not in law or by statute so classified. The clerk taxes costs set by statute. The court in the exercise of its discretion and as a procedural matter determines other expenses under the Fed. Rules of Civ. Procedure.

These appellants carried almost the entire costs of the original designated record, as well as paying for briefs and appeal costs in the court of appeals and in the Supreme Court of the United States. It is unjust to compel them to pay an expense unlawfully asserted and grounded by the government.

These appellants conclude that because the appellate court reversed the master's fee as to them, the trial court cannot go behind that reversal. This is especially so since the trial court construed its findings to dismiss

these appellants thus recognizing that the master was appointed on an erroneous theory of law in the first instance. This was and is the responsibility and fault in law and equity of the government in erroneously opposing the defendants' correct theory on damages.

CONCLUSION

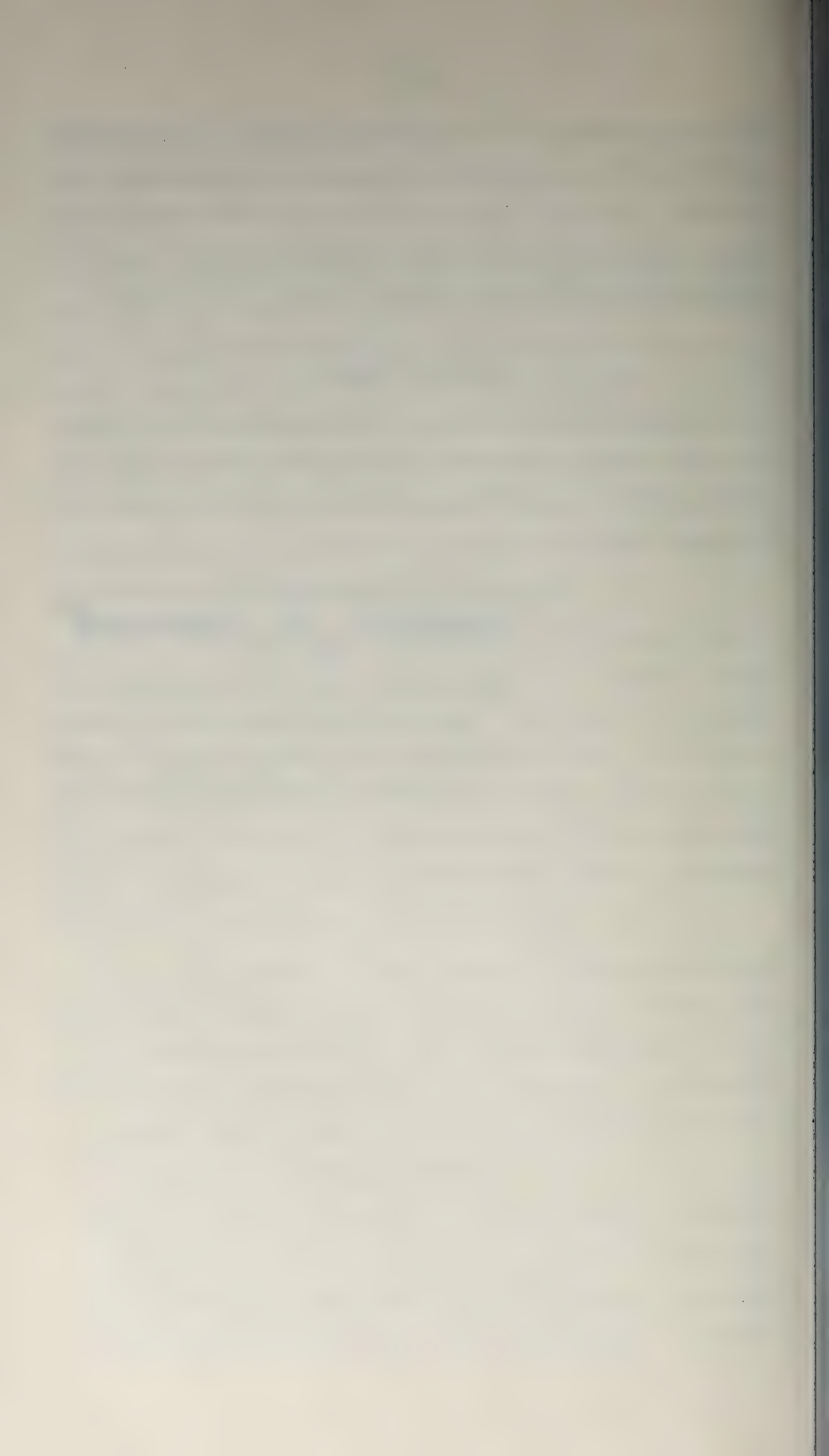
The decree against Barnett, Owens and Ester jointly charging them with other defendants with a portion of the award to the Special Master should again be reversed.

Respectfully submitted,

Arthur G. Barnett
ARTHUR G. BARNETT

McMICKEN, RUPP & SCHWEPPE

*Attorneys for Edward R. Ester,
Arthur G. Barnett and Donald
F. Owens, Appellants-Appellees.*



No. 16360

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA, and DON S.
GRIFFITH, Special Master, Appellees.

VIRGIL J. PAGUE, Appellant,

vs.

DON S. GRIFFITH, Special Master, Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

DONALD F. OWENS, et al., Appellees.

EDWARD R. ESTER, et al., Appellants,

vs.

DON S. GRIFFITH, Special Master,
Appellee.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington,
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FILED

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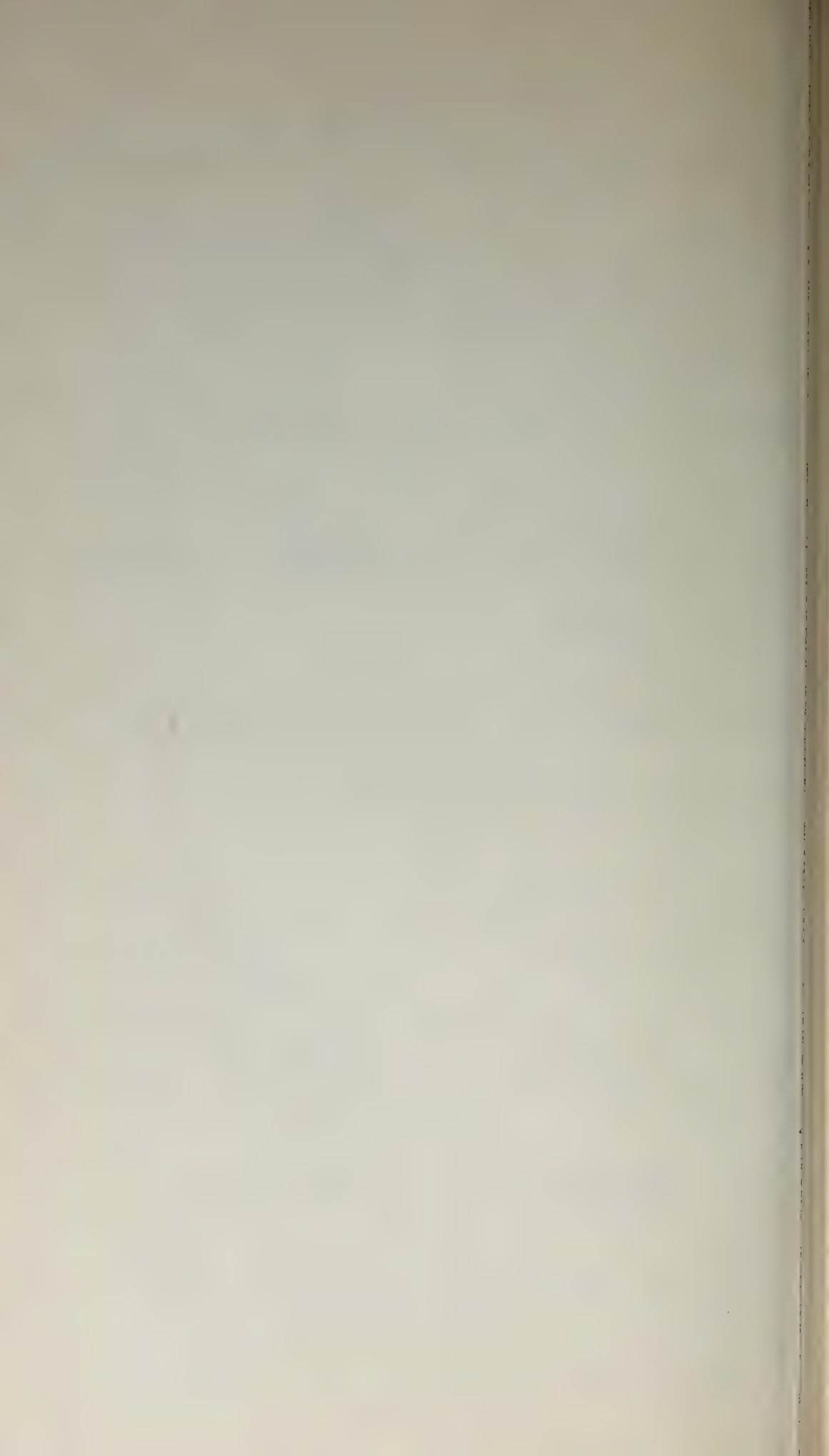
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

LYCETTE, DIAMOND & SYLVESTER,

Hoge Building,
Seattle 4, Washington,

Attorneys for Appellants Century Invest-
ment Corporation and Virgil J. Pague.

McMICKEN, RUPP & SCHWEPPE,

657 Colman Building,
Seattle 4, Washington,

McCANN, BARNETT & TOWNE,

1304 Northern Life Tower,
Seattle 4, Washington,

Attorneys for Appellants Ester, Owens
and Barnett.

PERRY W. MORTON,

Assistant Attorney General,

ROGER P. MARQUIS,

HAROLD S. HARRISON,

Attorneys,

Department of Justice,
Washington 25, D. C.,

CHARLES P. MORIARTY,

JOSEPH C. McKINNON,

1012 United States Court House,
Seattle 4, Washington,

Attorneys for Appellee and Appellant
United States.

BAYLEY, FITE, WESTBERG & MADDEN,

725 White-Henry-Stuart Building,
Seattle 1, Washington,

Attorneys for Appellee Don S. Griffith,
Special Master.



In the United States District Court, Western
District of Washington, Northern Division

No. 3804

UNITED STATES OF AMERICA, Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, a
corporation, et al., Defendants.

MOTION OF CENTURY INVESTMENT COR-
PORATION FOR SUMMARY JUDGMENT

Century Investment Corporation, pursuant to
Rule 56 of the Rules of Civil Procedure, moves for
summary judgment in its favor upon the following
grounds:

I.

There was a failure of proof on the part of the
plaintiff to establish any damages against this de-
fendant or any of the other defendants for which
any liability could be imputed to this defendant in
accordance with the terms of the judgment of the
Circuit Court of Appeals.

II.

The findings which have become the law of the
case have established that the government did not
have any exclusive right of possession during any
of the time when any of the defendants herein had
possession after the expiration of the time for the

removal of the buildings as set in the contract inasmuch as the government had not paid the full consideration for the leasehold in the form of ascertainable installments of taxes and the government's tenure had lapsed and there could be no trespass or damage for rental value of the land.

III.

This motion is based upon the opinion of the Circuit Court of Appeals, particularly that portion thereof which states:

"We hold that as to Century the judgment should be reversed and the cause remanded for a trial on the issue of damages only arising by reason of its breach of contract. The measure of such damages would appear to be the same as indicated above with respect to Barnett, Owens and Ester."

This motion is further based on that portion of the opinion of the Circuit Court of Appeals which states with respect to Barnett, Owens and Ester, wherein the Court says:

"It is possible that there may have been such a trespass or the existence of circumstances from which a contract to pay the reasonable rental value of the lands may be implied.

"This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. Barnett, Owens and Ester argue that the trial court so held in its supplemental findings of fact.

“We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether specific performance should be ordered. With regard to this, only the government’s immediate right of exclusive possession at the time the matter was before the court was important. It may be that the government was not prompt in completing its payment for previous months or years. But if such payments were ultimately made the government’s exclusive right of possession during such period at least as against these appellants would seem to be established.

“In our view justice therefore requires that the judgment as to Barnett, Owens and Ester be reversed and the cause remanded to the trial court. Upon remand the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper. If recovery is warranted on either of these theories it should not include any rental value of the buildings, but may otherwise include any actual expense incurred or monetary damages sustained by the government.”

This motion is further based upon the findings of the court, particularly Paragraphs I and II of the Findings of Fact and the Supplemental Findings of Fact and Conclusions of Law herein in which the court found:

“I.

“That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the land upon which the buildings, furniture, furnishings, equipment and appurtenances involved herein have at all times material to this action been and are now located.

“II.

“That the plaintiff has not fully sustained that burden in that although the judgment on the declaration of taking and the judgments awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore the court cannot find that such installments have been paid and accordingly the court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said buildings and clear the sites upon which they stand. This finding is based upon the necessity of the plaintiff establishing in this action its exclusive right of possession of said real estate.”

This motion is further based upon the records of the Clerk of this Court in Cause No. 1143 of which the Court may take judicial notice and as to which there was testimony at the trial of the above-entitled action which shows that the plaintiff did not pay into Court or tender the amount of the ascertainable taxes or any amount for taxes as compensation to the owners of the land for the taking thereof.

The proper construction by the Court of the findings heretofore made in accordance with the direction of the Circuit Court of Appeals will show that the Court did not find that the full compensation was ultimately paid or ever paid so as to give the government exclusive right to possession during the period material hereto.

Wherefore, Century Investment Corporation, prays for summary judgment dismissing this action as to it.

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN.

Attorneys for Century Investment
Corporation,

Acknowledgment of Service Attached.

[Endorsed]: Filed June 18, 1958.

[Title of District Court and Cause.]

MOTION OF VIRGIL J. PAGUE FOR
SUMMARY JUDGMENT

Defendant Virgil J. Pague, pursuant to Rule 56-B of the Rules of Civil Procedure, moves for summary judgment herein dismissing the action as to him. This motion is made upon the following grounds:

I.

By the judgment of the Circuit Court of Appeals it was determined that this defendant is not liable to the plaintiff on the theory of breach of contract and is in the same position as Barnett, Owens and Ester with respect to possible liability on the theory of trespass or implied contract to pay reasonable rental and there is no basis under the findings of the Court as properly interpreted for any possible liability on the theory of trespass or implied contract to pay reasonable rental.

II.

There was a failure of proof on the part of the government to establish any basis of liability for trespass or reasonable rental value at the time of the trial and such failure of proof bars any recovery at this time.

III.

A proper construction of the findings of fact of the Court as set out in Paragraphs I and II of the Supplemental Findings of Fact and Conclusions of Law will show that there was no exclusive right of possession of the land upon which the buildings, furniture, furnishings, equipment and appurtenances herein involved were located at the times material hereto in that the evidence introduced at the trial and now available to the Court through judicial notice of the files of this Court in Cause No. 1143 will demonstrate that the government at no time paid or tendered the ascertainable amounts

of taxes which were part of the consideration for the tenure of the government and by conditions subsequent, the government's tenure had lapsed and there could be no trespass or obligation to pay rent since the government did not have the exclusive right to possession of the property.

IV.

This motion is based upon the judgment of the Circuit Court of Appeals, particularly upon that portion which reads:

“From what has just been said, it is plain that Pague is not liable on the theory of breach of contract. It would appear, however, that Pague is in about the same position as Barnett, Owens and Ester with respect to possible liability on the theory of trespass or implied contract to pay reasonable rental. The judgment against Pague must therefore be reversed and the cause remanded for further proceedings similar to those which have been specified as to Barnett, Owens and Ester.”

This motion is further based upon that portion of the opinion of the Circuit Court of Appeals which provides with respect to Barnett, Owens and Ester:

“It is possible that there may have been such a trespass or the existence of circumstances from which a contract to pay reasonable rental value of the lands may be implied. This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. Barnett,

Owens and Ester argue that the trial court so held in its supplemental findings of fact. We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question of whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. It may be that the government was not prompt in completing its payments for previous months or years, but if such payments were ultimately made the government's exclusive right of possession during such period at least as against these appellants would seem to be established. In our view justice therefore requires that the judgment as to Barnett, Owens and Ester be reversed and the cause remanded to the trial court. Upon remand the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial as may be thought proper. If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred or monetary damages sustained by the government."

This motion is further based upon the testimony given in the previous trial and the records of the Clerk in Cause No. 1143 which established that the government did not at any time either before or

subsequent to times material to this action tender the ascertainable amount of the taxes.

Wherefore, this defendant prays for summary judgment dismissing the action as to him.

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,
Attorneys for Virgil J. Pague.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 18, 1958.

[Title of District Court and Cause.]

MOTION OF DONALD F. OWENS AND
ARTHUR G. BARNETT FOR SUMMARY
JUDGMENT

Come now Donald F. Owens and Arthur G. Barnett, and their respective marital communities, and move for summary judgment dismissing the plaintiff's action against them under Rule 56 of Federal Rules of Civil Procedure, on the following grounds:

I.

This motion is based upon the findings of fact and supplemental findings of fact and conclusions of law, and all pleadings, depositions, admissions and the records and files herein together with plaintiff's affidavits, and is further supported by the

affidavits and memorandum attached hereto, and the testimony received by the above entitled court, all of which show that there is now no genuine issue as to any material fact affecting these affiants as defendants in the above entitled action.

II.

That the complaint as filed by the plaintiff herein, and the evidence in support thereof during the trial before the above entitled court, was based on two grounds:

(1) Action for breach of contract.

(2) Plaintiff's alleged right at all times material to the action (see paragraph VIII of plaintiff's complaint) to exclusive possession of the land upon which Building 104, owned by these defendants, was situate.

III.

The U. S. Court of Appeals for the Ninth Circuit, after review of the appeal taken herein, remanded the cause to this court, using the following language:

“* * * upon remand the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings and the record or by proceeding to another trial as may be thought proper. * * *”

IV.

Supplemental findings of fact I and II entered by this trial court is that the plaintiff failed to

prove its exclusive right of possession of the land upon which Building 104 was located, at all times material to the action. Supplemental conclusion of law I is that the plaintiff did not prove its exclusive right of possession at all times material to this action. The plaintiff therefore failed to prove the allegation in paragraph VIII of its complaint that it

“* * * at all times herein mentioned, had and does now have exclusive use of said real property. * * *”

Further, the findings are that the land underlying Building 104 is owned by Donald F. Owens and Arthur G. Barnett.

V.

The opinion of the said Circuit Court of Appeals also remanded the case for the purpose of ascertaining damages for breach of contract against the parties thereto; and stated that as to Barnett and Owens the judgment could not be sustained for the reason that “* * * they were not privy to the contract. * * *”

VI.

The plaintiff, having failed to prove its right to exclusive possession of the land owned by these defendants, Barnett and Owens, there can be no liability for trespass or for damages for the rental value of the land.

Wherefore, defendants Barnett and Owens pray that this court construe the findings in accordance with the suggestion of the Circuit Court of Appeals and grant the motion of these defendants for summary judgment dismissing this action as to defendants Barnett and Owens.

/s/ ARTHUR G. BARNETT,
One of the Attorneys for Donald F. Owens and
Arthur G. Barnett, Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 1, 1958.

[Title of District Court and Cause.]

MOTION OF EDWARD R. ESTER FOR SUMMARY JUDGMENT

Comes now Edward R. Ester and Lorraine M. Ester, his wife, as a marital community, and moves for summary judgment dismissing the plaintiff's motion against them under Rule 56 of Federal Rules of Civil Procedure, on the following grounds:

I.

This motion is based upon the findings of fact and supplemental findings of fact and conclusions of law, and all pleadings, depositions, admissions and the records and files herein together with plaintiff's affidavit, and is further supported by the affidavit attached hereto, and the testimony received by the above-entitled court, all of which show that

there is now no genuine issue as to any material fact affecting these affiants as defendants in the above-entitled action.

II.

That the complaint as filed by the plaintiff herein, and the evidence in support thereof during the trial before the above-entitled court, was based on two grounds:

(1) Action for breach of contract.

(2) Plaintiff's alleged right at all times material to the action (see Paragraph VIII of plaintiff's complaint) to exclusive possession of the land upon which Building 105, owned by these defendants, was situated.

III.

The U. S. Court of Appeals for the Ninth Circuit, after review of the appeal taken herein, remanded the cause to this court, using the following language:

“* * * upon remand the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings and the record or by proceeding to another trial as may be thought proper. * * *”

IV.

Supplemental findings of Facts I and II entered by this trial court is that the plaintiff failed to prove its exclusive right of possession of the land

upon which Building 105 was located, at all times material to the action. Supplemental conclusion of Law I is that the plaintiff did not prove its exclusive right of possession at all times material to this action. The plaintiff therefore failed to prove the allegation in Paragraph VIII of its complaint that it.

“* * * at all times herein mentioned, had and does now have exclusive use of said real property. * * *”

Further, the findings are that the land underlying Building 105 is owned by Edward R. Ester and Lorraine M. Ester.

V.

The opinion of the said Circuit Court of Appeals also remanded the case for the purpose of ascertaining damages for breach of contract against the parties thereto; and stated that as to Edward R. Ester and Lorraine M. Ester the judgment could not be sustained for the reason that “* * * they were not privy to the contract. * * *”

VI.

The plaintiff, having failed to prove its right to exclusive possession of the land owned by these defendants, Ester and wife, there can be no liability for trespass or for damages for the rental value of the land.

Wherefore, defendants Ester and wife pray that this court construe the findings in accordance with the suggestion of the Circuit Court of Appeals and

grant the motion of these defendants for summary judgment dismissing this action as to defendants Ester and wife.

/s/ WARREN A. DOOLITTLE,
Attorney for Edward R. Ester and Lorraine M.
Ester, Defendants.

[Endorsed]: Filed July 9, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD R. ESTER IN
SUPPORT OF MOTION OF EDWARD R.
ESTER FOR SUMMARY JUDGMENT

State of Washington
County of King—ss.

Edward R. Ester, being first duly sworn, on oath deposes and says:

That he is one of the defendants and makes this affidavit in support of his motion for summary judgment.

This affiant is competent to testify as to the matters herein stated.

That based upon the facts established by the findings of fact entered herein, and upon all the pleadings, admissions, records and files and particularly plaintiff's affidavit on file herein, there is now no genuine issue as to any material fact affecting the defendant Edward R. Ester and his spouse in

this action for the reason that all of said records, and the testimony received by the court, conclusively establish the plaintiff failed during said trial to prove its right to exclusive possession of the tracts underlying Building 105, owned by said defendant.

This affiant states that he received, by mail, from the Clerk of the U. S. Court of Appeals for the Ninth Circuit, copies of the Opinions, respectively dated October 30 and December 23, 1957, in cause No. 15219 and that the same, as received by affiant, contained corrections and insertions thereon as made by the said Clerk, copies of which are already in the records and files herein.

This affiant incorporates in this affidavit all the matters and things set forth in the memorandum and motion of defendants Donald F. Owens and Arthur G. Barnett for summary judgment in the above-entitled cause.

/s/ EDWARD R. ESTER.

Subscribed and sworn to before me this 2nd day of July, 1958.

[Seal] /s/ E. LORRAINE SECHIER,
Notary Public in and for the State of Washington,
residing at Seattle.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 9, 1958.

[Title of District Court and Cause.]

EXCERPTS OF PROCEEDINGS

Before Judge Bowen. April 20-21, 1956.

The Court: * * * In view of that fact, that there is such a short time remaining of this term anyway and because it is already shown in the record, as I understand it, that these defendants are now the owners, the ownership of all of them together when added together accounting for the fee title of all of the land on which the buildings here in question are situated, and in view of the fact that they are such owners and that after that term expires they would be entitled to the possession of it, the Court would be very reluctant in any event to decree removal of property of this nature and would feel that better equity would be served by leaving the plaintiff to its legal remedy of recovering the value of the use by these defendants of the properties here in question which they have not paid for.

The Court is thinking about a result in general along those lines as being the proper result to be reached by this Court upon this record. I am going to recess the court for a moment and let Counsel think of it and see if, in a word, they know of any reason why that should not be done, and I will say to plaintiff's Counsel and all those present that I am certain that the Government, on this record, has not factually sustained its allegation in its complaint that it had the right to the exclusive possession of the real property. I am not talking

about the buildings. They had the right to possession of the buildings, but not the real property on which the buildings were located for the time they allege here, because the Government has not shown in this record factually that the Government has from year to year successively paid an amount equivalent to the taxes to have been annually assessed against the real property as a part of the just compensation awarded in addition to the stated rental award as just compensation.

Court will be at recess subject to call, and it will only be a few moments because I must close this matter today.

(Short recess.) * * * * *

April 21, 1956 * * * * *

The Court: The Court expects to make the following findings of fact in substance, which are to be supplemental to and amendatory of the findings and conclusions of the Court heretofore entered in this case, and from a preponderance of the evidence the Court for such supplementary and amendatory purpose now further finds, concludes and decides:

1. That it was incumbent upon plaintiff herein to prove its exclusive right of possession of the land upon which the buildings, furniture, furnishings, equipment and appurtenances involved herein have at all material times been and are now located.

2. That plaintiff has not sustained that burden, in that, although the judgment on the declaration of taking and awarding just compensation was valid, plaintiff has not proved that the future ascertainable installments (that is, of the future

ascertainable amounts equivalent to annual real estate taxes on the lands subject to the estate taken by the Government) of such just compensation have been paid; that the Court cannot find that such installments have been paid; that the Court does find that plaintiff is not entitled to any relief, based upon the necessity of establishing such plaintiff's exclusive right of possession. * * * * *

[Endorsed]: Filed July 10, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH C. McKINNON

United States of America
Western District of Washington
Northern Division—ss.

Joseph C. McKinnon, being duly sworn, says:

That he is an Assistant United States Attorney and as such trial counsel for the plaintiff in this action. That he makes this affidavit in opposition to the motions for summary judgment made by the defendants.

That on July 8, 1958, in Cause No. 1143, United States District Court for the Western District of Washington, Northern Division, the United States of America deposited with the Clerk of the Court the sum of \$5,490.74. That the said sum equals or exceeds the amount of rents and taxes not previously paid by the United States of America for the exclusive right of possession to the lands condemned in Cause No. 1143.

/s/ JOSEPH C. McKINNON.

Subscribed and sworn to before me this 10th day of July, 1958.

[Seal] /s/ MARION MILLER,
Deputy Clerk, United States District Court, West-
ern District of Washington.

Certificate of Service by Mail Attached.

[Endorsed]: Filed July 10, 1958.

[Title of District Court and Cause.]

ORDER GRANTING SUMMARY JUDGMENT

Defendants Century Investment Corporation, Virgil J. Pague, Arthur G. Barnett and wife, Edward R. Ester and wife, and Donald R. Owens and wife, having each moved for summary judgment dismissing the above-entitled action as to each of said respective defendants, said motion having come regularly on for hearing before the Court on the 10th day of July, 1958, each of said defendants being represented by Counsel and the United States being represented by Joseph C. McKinnon, Assistant United States Attorney, and the Court having heard the arguments and having considered the records in this matter and the order of the Circuit Court of Appeals, and the Court having construed its prior findings and having considered all of the prior and existing record, and having rendered its oral decisions which are by this reference incorporated herein, and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the motions for summary judgment dismissing the above-entitled action are hereby granted as to defendants Virgil J. Pague, Arthur G. Barnett and wife, Edward R. Ester and wife, and Donald R. Owens and wife, and denied as to Century Investment Corporation, and as to Virgil J. Pague, Arthur G. Barnett and wife, Edward R. Ester and wife, and Donald R. Owens and wife, the above-entitled action is hereby dismissed subject to a reservation as against each of said defendants of all questions as to liability for the payment of the fee of the Special Master, Don S. Griffith, and with respect to the petition of Don S. Griffith for payment of his fee final disposition will be made with respect to all parties, including the defendants above-named at the time of trial of the case against Century Investment Corporation or at the time fixed by the Court.

Done in Open Court this 11th day of July, 1958.

/s/ JOHN C. BOWEN,
District Judge.

Presented by and approved:

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,
Attorneys for Defendants.

Approved as to form.

/s/ WARREN A. DOOLITTLE,
Attorney for Defendants
Edward R. Ester and Wife.

Approved as to form.

/s/ ARTHUR G. BARNETT,
One of Attorneys for Barnett
& Owens.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 11, 1958.

[Title of District Court and Cause.]

MOTION FOR REHEARING AND
RECONSIDERATION

Comes now the United States of America, plaintiff, by Charles P. Moriarty, United States Attorney, and Joseph C. McKinnon, Assistant United States Attorney, and moves for reargument of the motions for summary judgment heretofore granted in favor of defendants Donald F. Owens, Arthur G. Barnett and Edward R. Ester, and their respective marital communities, and defendant Virgil J. Pague.

This motion is based upon the pleadings herein, the evidence adduced at the trial of this cause, the findings of fact by the trial court, the opinion of the Court of Appeals, and the subjoined affidavit of Joseph C. McKinnon.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ JOSEPH C. MCKINNON,
Assistant U. S. Attorney.

United States of America
Western District of Washington
Northern Division—ss.

Joseph C. McKinnon, being duly sworn, says:

1. He is an Assistant United States Attorney assigned as trial counsel for the plaintiff in this cause and makes this affidavit on information and belief in support of a motion for rehearing and reconsideration of the motions of the individual defendants for summary judgment.

2. The said motions were granted by this Court for the reason, among others, that the Court found that the plaintiff did not have exclusive possession of the land upon which the defendants kept and used certain emergency housing structures.

3. It is respectfully submitted that the plaintiff, United States of America, was entitled to exclusive possession of all material land areas at all times prior to June 30, 1956. A sketch of the said area is annexed hereto as Exhibit A and made a part hereof. All of the land shown on that sketch, with the exceptions of Lot 1; Lots 7 to 9, inclusive; Lots 25 to 27, inclusive; and the northerly five (5) feet of Lot 10, was duly condemned by the United States of America. The declaration of taking describes the estate condemned as "the exclusive use of the lands * * * for a period of one year, with the right to renew from year to year for the duration of the existing national emergency and three years thereafter, together with the right

to remove [improvements] at the termination of such use * * *." The said estate was duly renewed from year to year until it finally terminated on June 30, 1956. It goes without saying that after the condemnation all purchasers of the land took title subject to the exclusive right of possession of the United States of America, so long as such right of the United States continued by virtue of the declaration of taking and the subsequent acts of the Court and of the plaintiff, United States of America.

4. It is not disputed that the United States of America duly served notices of renewal from year to year and duly deposited in the registry of this court the amounts which from time to time were fixed as the rental value of the land, exclusive of the amounts of local real estate taxes on the land.

5. Many of the judgments fixing just compensation for the use of the several parcels of land shown on Exhibit A provided that in addition to a stipulated amount of rental to be paid by the United States of America, the United States would reimburse the owners in amounts equal to the real estate taxes validly levied upon the land. The individual defendants successfully contended before this Court in their motions for summary judgment that they were the present owners of part of the land and that the United States had not reimbursed them for such taxes and therefore did not have exclusive possession of the land.

6. The fact is that without regard to legal issues as to when, how, and under what conditions just compensation must be paid in condemnation cases, much of the land upon which the individual defendants trespassed had no taxes due during any part of the period of the condemnation. In addition, as to other parcels of land, the Government had paid the taxes for some parts of that period. It is respectfully submitted that there is no doubt as to the Government's right to possession of that land upon which no taxes were due and that land on which the taxes were duly paid by reimbursement to the property owner. Granting that premise, it follows that summary judgment in favor of the individual defendants was not justified, at least as to the land where full and complete compensation was paid by the United States before the first trial of this cause. (As will be pointed out in a memorandum of law, there is ample legal support for the Government's contention that it had an exclusive right of possession, at least as against defendants in this cause, of all of the land wrongfully used by the defendants during 1953, 1954, 1955 and the first half of 1956.)

7. The reason why some of the property had no taxes to be paid is that such land was owned by King County, Washington, and sold or transferred by it to the City of Seattle. As such, it was and is exempt from taxation. Some of the land originally owned by King County has since been transferred into private ownership and become subject to taxation; but Lots 11, 30 and 34, and $\frac{1}{2}$ of

Lot 12, as shown on the annexed Exhibit A, together with the south 35 feet of Lot 10, as shown on that sketch, have not been subject to taxes at any time material to the issues in this suit. Consequently, by paying the amount of rental fixed by the judgments the United States of America paid everything due for the use of those lots. There was nothing further to be paid as reimbursement for taxes as no taxes were levied and susceptible of reimbursement.

8. It is to be noted that Building 102, which defendant Virgil J. Pague has rented at a profit is partly upon Lot 34, one of the City-owned lots. It also appears from Exhibit A that Building 103, likewise owned by him, is physically present on City-owned Lots 10, 11, 30 and $\frac{1}{2}$ of 12.

9. No matter what legal construction is given to the obligation of the United States to pay just compensation there is no question of the fact that full and complete just compensation was timely paid into the registry of this court for Lots 11, 30, 34 and the south 35 feet of Lot 10, $\frac{1}{2}$ of Lot 12. It is respectfully submitted that without regard to anything else before the Court, the orders granting summary judgment as to defendant Pague should be modified so as to hold him responsible as a trespasser upon those lots where no taxes were due and therefore could not have been paid. While perhaps not material, it is interesting to note that defendant Pague, after trespassing on those lots while they were in the exclusive possession of the

United States throughout 1954 and 1955 and the first half of 1956 has continued to trespass upon them after exclusive possession reverted to the City of Seattle. Deponent has been advised by agents and employees of the City of Seattle that defendant Pague has not obtained any permit for the use of City-owned lots and has not paid any rental to the City for such use of City-owned lots.

10. During at least part of the period of the trespass, upon federal land by the individual defendants, taxes had been paid by the United States on some of the land by reimbursement in the customary manner to the then owners of the land. In other cases, the then owners of the land waived payment of taxes by due execution of a receipt in full for all just compensation for use of the land.

11. Records of the Public Housing Administration disclose that all taxes on Lot 33, as that lot appears on annexed Exhibit A, have been reimbursed to the owner for the years 1953, 1954, 1955 and 1956; similar reimbursement was made for Lot 29 for the years 1953, 1954 and 1955; for the northern half of Lot 12 and all of Lot 13 for the years 1953 and 1954; and for Lot 23 for the years 1953 and 1954.

12. Receipts reading as follows have been executed and delivered for a good and valuable consideration by then owners of the land for the periods which are set forth below as to designated lots, as such lots are shown on Exhibit A:

"Receipt is hereby acknowledged, by the undersigned, of Check No., in the amount of, in full and complete satisfaction of award of annual rent for the year beginning in Cause No. 1143, United States of America, Petitioner, vs., et al., Respondents. Parcel(s) No.

Dated this day of, 19.
"

Lots 2, 3, 4, 5, 6, 15, 16, 17, 18, 19 and 20—receipts signed by Ellen M. Tobin for the one-year period beginning February 21, 1953;

Lots 23 and 24—receipt signed by J. O. and Mary J. Chase for one-year period beginning February 21, 1953, and receipt signed by J. O. Chase covering Lot 24 for the years 1954, 1955 and 1956;

Lots 13 and 14 and the south half of Lot 12—receipt signed by Grace Sandell and Flo Rae for one-year period beginning February 21, 1954;

Lot 33—receipts signed by Theodore V. Tramill and Betty Tramill for years beginning February 21, 1953; February 21, 1954; and February 21, 1955;

Lots 28 and 29—receipt signed by Roger Anderson, Jean Baird Anderson and Myrtle I. Olson for one-year period beginning February 21, 1953.

13. It therefore appears that as to those lots and years the United States may not properly be charged with a failure to pay full compensation for its leasehold estate. Without regard to law as to the time and method of payment of just com-

pensation for such an estate in a federal condemnation case, it appears that the motions for summary judgment should be denied for the reason, among others, that all compensation was promptly paid for some of the land used by each of the defendants.

14. While the individual defendants are the present owners of some of that land, they did not have any interest in the land until defendant Century Investment Corporation contracted to remove the buildings. Obviously they acquired no better title than their vendors had to give, and in each case the seller's title was subject to the leasehold interest of the United States which did not expire until June 30, 1956. They acquired no greater rights against the United States than were possessed by their predecessors in interest. And the rights which were so acquired did not include any right to have the United States deposit the amount of the taxes in the registry of this court. The judgments entered by this Court fixing just compensation were entered with full knowledge of the then long established practice of having the landowner submit his receipted tax bill to the appropriate federal agency and be reimbursed by it without specific court approval. No single judgment permitting and directing the payment of funds deposited with the Clerk in Cause No. 1143 directed the payment of an amount equivalent to taxes. That was so because the Court and the parties were well aware that each landowner, after paying his taxes, submitted

the tax receipt to the Public Housing Administration and was reimbursed directly without application to the Court. The only right of the owner was to such reimbursement after proof of payment of taxes, and the right was not amplified because of a change in ownership.

15. The judgments of this Court, with respect to many of the parcels which are shown on Exhibit A, contained provisions as follows:

“During the period of occupancy of said property by the United States or its assigns, the United States agrees to reimburse said respondents or their heirs or assigns for any increase in the general taxes imposed upon the premises and paid by the lessor which increase is based solely upon the value of improvements placed thereon by the United States; provided, however, that at least 30 days before paying such increased taxes, respondents shall submit to the Federal Public Housing Authority a copy of the tax bill in order to enable the United States to endeavor to have such increase eliminated. Any payment made by respondents while the United States is endeavoring to eliminate such increase shall be made under protest or in the manner provided for by applicable statutes for the recovery of illegally imposed taxes;”

16. It is respectfully submitted that there was and is no requirement that the United States deposit the amount of such taxes in the registry of the court. Its obligation was to reimburse the owner of the land for the amount of lawfully im-

posed taxes when, and if, the owner complied with the conditions precedent to such reimbursement; i.e., the timely submission of tax bills and the subsequent delivery of tax receipts to the authorized representatives of the United States. Plaintiff, United States of America, contends that such method of payment was not only proper but was in fact required by the procedure in effect at all material times as well as by the judgments of the Court in Cause No. 1143.

17. Yet if there were any ambiguity in the judgments of the Court with respect to the time and condition of payment of real estate taxes, the conduct of the parties over a long period of time should be taken into account in interpreting such ambiguity. At all times prior to the acquisition by the individual defendants of some interests in some of the land during 1953, 1954 and 1955, their predecessors in interest had followed the approved practice of submitting paid tax bills to the Public Housing Administration and receiving payment directly from that Administration without any deposit in the registry of the court. Having acquiesced in that practice for many years, those predecessors in interest could not now properly urge this Court to hold that the Government had failed to comply with its legal obligations when it followed a practice of reimbursing the owner for such taxes upon submission of a tax bill. The individual defendants in this case as successors in interest can have no greater rights and therefore are likewise barred

from claiming that the United States had an obligation to search the records of the local taxing authorities, make a determination of the amount due for taxes, and then deposit such amount in the registry of this court. In this connection it is important to note that the amounts involved are relatively small. The taxes on some lots for some years have been less than ten dollars.

18. The individual defendants in this suit have never complied with the conditions precedent to the reimbursement to them of the amount of such taxes. They have never submitted the tax bills to the United States in time for it to protest any overassessment or illegal assessment which may have been levied, and they have never submitted the paid bills or tax receipts or any request for reimbursement. On the contrary, Messrs. Pague, Barnett and Owens have each advised a representative of the office of the United States Attorney that they did not wish to receive rentals for the land owned by them until after the termination of the condemnation case. Yet they now seek to take advantage of their own default and use its necessary consequence as a technical defense in a suit to recover money damages for the wrong which they have done to the United States of America.

19. Apparently it is their claim that their trespass is to be rewarded rather than punished by the sovereign. Individual defendants Ester, Barnett and Owens have filed answers to the petition of the United States for termination of Cause No.

1143, the condemnation suit. In those answers they each claim damages from the United States for its use and occupancy during 1954, 1955 and 1956 of the very land involved in the instant suit.

20. This Court in its oral decisions granting the motions of the individual defendants for summary judgment indicated that the individual defendants should be required to respond in damages but that there was no proper way of assessing such damages against them in this suit. It is respectfully submitted that a trial, if granted to the United States of America, against the individual defendants would permit the introduction of evidence and appropriate amendment of the complaint which would amply justify an award of damages against the individual defendants.

21. That is true without regard to legal questions concerning the Government's obligation to deposit the amount of taxes in the registry of this court when the defendants have failed and neglected to comply with the conditions precedent with reference to tax bills and tax receipts. The United States of America has now deposited in the registry of this court to the credit of Cause No. 1143 a sum which equals or exceeds all taxes assessed again the land during the years 1953, 1954, 1955 and 1956 which have not heretofore been paid by the United States to the then owners of such land.

22. In any event, as has been shown earlier in this affidavit, no taxes were due at the time of the first trial on much of the land which these defend-

ants used for their own purposes during the period of the leasehold estate which the United States had taken by condemnation, and taxes for some parts of the land used by the defendants were duly paid by plaintiff before the first trial.

23. It is therefore respectfully requested that the case be set down for trial to give the United States an opportunity to prove:

a. the existence of the conditions precedent to the payment of tax bills,

b. that no taxes were owing on much of the land for at least part of the periods of the individual defendants' wrongful use of such land,

c. the individual defendants not only failed to send in the tax bills but on the contrary advised representatives of the United States that they did not wish any part of the rental paid to them while the condemnation suit was still pending, and

d. an amount at least equal to unpaid taxes has now been deposited in the registry of this court in Cause No. 1143.

24. If the Court gives the plaintiff a trial against the individual defendants, the Government also expects to be able to prove that the defendants induced the breach of contract by Century Investment Corporation and should be equally liable with it in damages for such breach of contract. In its memorandum of law submitted on this motion for rehearing, authority is shown in support of the proposition that the Court should freely grant amendment of the pleadings where, as here, there

is no doubt of the wrongful conduct of the defendants and the damages to plaintiff have been substantial.

25. And damages to plaintiff in this case are unquestionably substantial. In addition to its heavy disbursements for rental of the land and other necessary expenses it had great general damages. Although fixing the dollar value of the general damages is difficult, there is no problem in determining that they are more than nominal. It was the public policy of the United States to sell the temporary housing buildings at a loss to prevent the growth of slum areas. The buildings were so designed and constructed as to make them suitable for temporary emergency housing but were not and are not the kind of structures which should be given a permanent place in an urban area. Accordingly, the four buildings involved in this suit were sold by the United States for their scrap value which has been estimated to be less than ten per cent of their "on site" value. Such a sale was required by law, and the law was enacted in furtherance of a public policy. The danger apprehended by the Congress if it permitted the continued use of these substandard structures after the termination of the emergency has proven in this case to have been a very real one. Deponent viewed the buildings in question on July 20, 1958, and found a disturbing slum area of unkept shacks scattered with no apparent plan upon a weed-grown block in an industrial area with factories, warehouses, and open storage of rusty machinery.

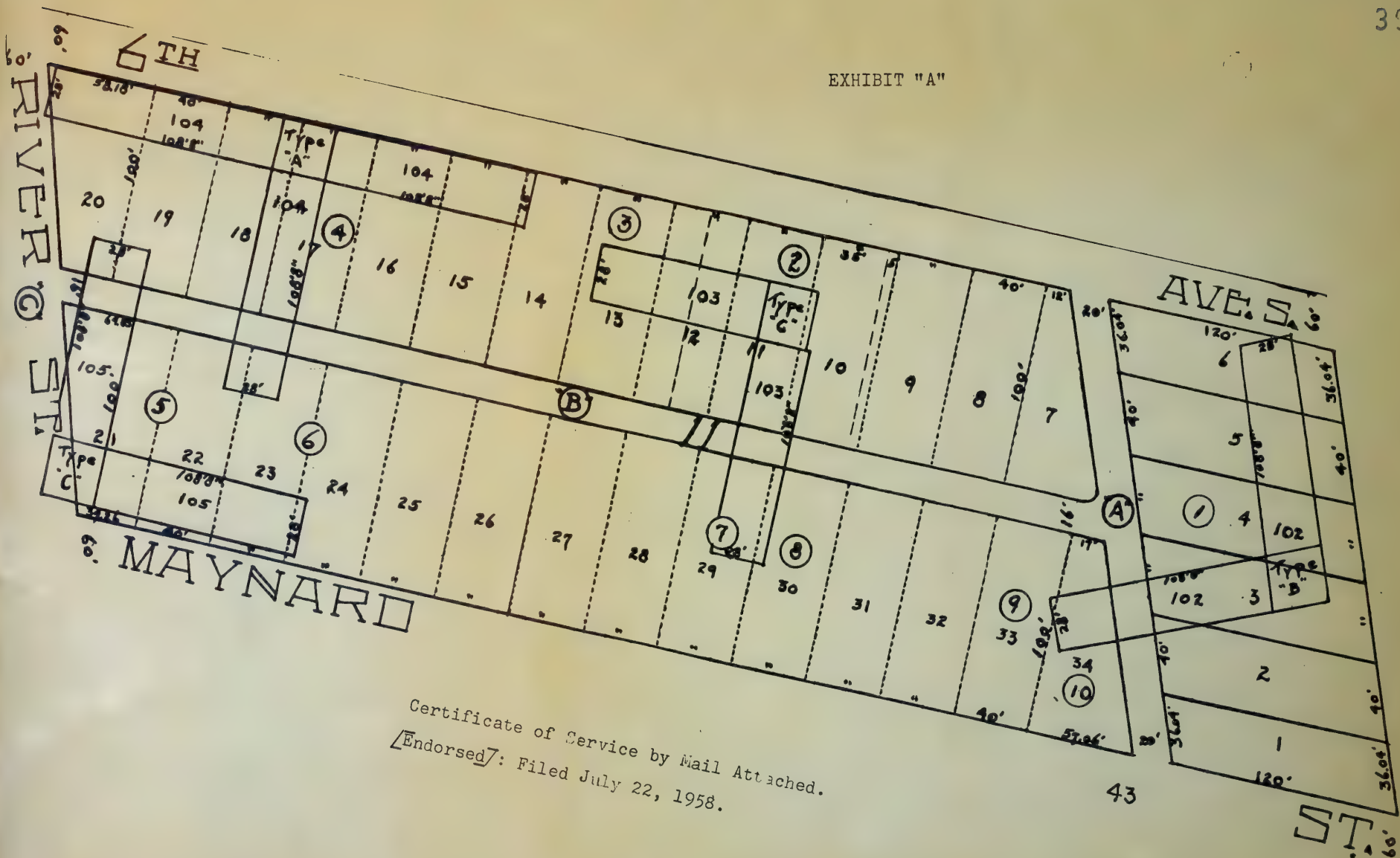
Wherefore, it is respectfully requested that the Court grant rehearing of the said motions for summary judgment, reconsider them, and upon such rehearing and such reconsideration, deny the motions for summary judgment and set the case down for trial to give the United States of America an opportunity to prove the matters alleged in this affidavit. It is further respectfully requested that in the event the Court denies this motion for rehearing and reconsideration, it make the express determination and direction permitted by Rule 54(b) of the Federal Rules of Civil Procedure so that the United States of America may appeal from this Court's decision without a costly but fruitless trial against a corporation which probably could not pay any substantial judgment against it.

/s/ JOSEPH C. McKINNON.

Subscribed and sworn to before me this 22nd day of July, 1958.

[Seal] /s/ MARION MILLER,
Deputy Clerk, United States District Court, Western District of Washington.

EXHIBIT "A"



Certificate of Service by Mail Attached.
 [Endorsed]: Filed July 22, 1958.

[Title of District Court and Cause.]

EXCERPTS OF PROCEEDINGS

Before Judge Bowen. July 10-11, 1958.

* * * * *

The Court: The Court wishes to change what has been orally stated here by the Court a few minutes ago.

As to all defendants in this case except the defendant Century Investment Company the Court does grant the motion for summary judgment in favor of defendants because the Court has already construed its findings and in pursuance of the Appellate Court's permission does now again construe them to mean, as the Court intended at the previous trial to rule, that the Government never did have any right of possession and therefore had no right to an action based on any theory of wrongful interference with that possession such as an action for trespass, and further because the Appellate Court in reversing this Court said in effect, among other things, that, not only as to the trespass basis of action but also as to a suggested possible implied contract basis of action, plaintiff United States would have no such right against these individual natural defendants if the Court found, which this Court did and does, that the Government had no right to exclusive possession, and further because the Appellate Court held that there was no contract obligation on the part of any defendant in this case except the defendant corporation Century Investment Company.

* * * * *

The Court: This Court at the previous trial allowed recovery against all of these parties upon what appeared to me to be a correct theory of the law and the theory suggested by the evidence in the case, as explained in that trial record and in the record made herein subsequent to receipt of the Appellate Court mandate, but the Appellate Court has, as it has the right to do and, if it thinks the record justifies, has the duty to do, differed with this Court in what has been done, has reversed this Court, and has directed a new trial with specified directions. By that action, as I understand it, the Appellate Court has destroyed the only grounds that I know of on the facts disclosed by the evidence in this case and on the findings already made on the evidence for any recovery against these individual defendants.

* * * * *

July 11, 1958

The Court: I wonder if in this proposed order form Counsel thought it appropriate to put in and if you have put in any expression of the finding of the Court in this connection which would indicate the reason for the Court's opinion that it was appropriate and legally correct to enter this order.

This Court thought in substance and effect yesterday and thinks now that the reason the motions for summary judgment should have been and were granted and why this order therefor should now be entered is that this Court did in fact consider all of the evidence and circumstances evidenced by the record already before the Court, and this Court

did intend to, and thought it did, decide at the previous trial that the Government had not established and could not establish any right to possession at any time material to this action and that there could not, therefore, be any basis for an action for trespass, and yesterday and today this Court also thought that it had at the former trial considered the evidence in the light of and insofar as it had a bearing on any other obligation, no matter by what name you call it, which the facts and the circumstances shown by the record imposed upon these individual defendants to respond to the plaintiff on any other cause of action or theory, but this Court at the previous trial was unable from evidence in the record to find any other theory of recovery.

And further in substance and effect this Court thought yesterday and now thinks the motion for summary judgment to the extent granted by this Court orally yesterday was called for because the Appellate Court has directed this Court not to consider in connection with any new trial or retrial of this case any evidence received previously concerning the rental income which the defendants have received on account of this property. That would seem to me to cover not only the present issues before the Court, but any other that might be named in any additional pleading, because during the times in question it then appeared that plaintiff was in default and would so continue as to conditions precedent and indispensable to plaintiff's being entitled to collect rental income.

Notwithstanding the Court's emphasis already laid upon the Court's continued belief that the Appellate Court was wrong in making the finding as to what the Court did respecting that evidence about rentals received by the individual defendants who as house purchasers received the rentals, the Court said in that connection, and it is true in connection with every other related situation referred to yesterday, that, in effect, no matter whether this Court thinks the Appellate Court was wrong or not, this Court stands ready at all times to do its best to apply to any future or any subsequent action of this Court the directions and rulings of the Appellate Court which are pertinent.

Mr. Iversen: I have handed up a form of order, if the Court please.

Mr. McKinnon: May I inquire, your Honor, if the Court's remarks this morning about the belief of the Court that the Government would be unable at any trial to advance any theory of action which would entitle them to damages against the defendants under the decision of the Court of Appeals was intended to include the possibility that the Government could proceed against the individual defendants on the theory of inducing breach of contract or conspiracy to breach a contract?

The Court: That, if course, involves future contingencies, but I will respond to that question in this way, that insofar as concerns the use of that evidence about the rental receipts and how much rentals were received by these defendants, this Court is forbidden as long as this direction in this

case from the Circuit Court remains in effect. The result is that in effect this Court is directed not to consider that evidence for anything before this Court. I do not think this Court would be at liberty to consider it on the prospective cause of action referred to, because the individual defendants could not have wrongfully induced defendant corporation respecting a presently claimed right of possession and rent collection which plaintiff did not then have and as to which would never and in fact before July 8, 1958, never did try to perform the conditions necessary to such possession rights.

And further the Court comments and states that this Court considered in this case at the other trial, which was a very thorough trial and which brought before this Court all of the evidence and circumstances connected with this whole transaction, as to whether that evidence might have properly been used by the Court only upon the issues then framed or whether there might be subsequently framed issues not included and not related to the issues in the pleadings before the Court. All the facts and circumstances were gone into and it cannot make any difference on that score, really and truly, whether those same facts and circumstances related to some issue before the Court or whether they related to some other issue not then stated. They were all gone into and the Court could not discover any basis for recovery other than the one the Court adopted, which the Appellate Court has held was an erroneous theory, and I think the rea-

son the Appellate Court so held is because the Appellate Court did not have all of the record before it which had been before this Court and which influenced this Court's judgment.

Everybody connected with this case may assume that if this Court could have found upon the record any other theory that was more appropriate and more legally correct as an issue or a cause of action on which to apply that evidence then before the Court, that this Court very likely would have done so then because this case was very troubling and confused and greatly involved during the whole course of it.

* * * * *

(Short recess.)

The Court: All are present. As a part of what the Court has already said the Court wishes to attempt to let the record show a more explicit reference to the circumstance that certainly has a very important bearing upon the granting of these motions for summary judgment.

The Court in that connection wishes to emphasize that this Court has, in pursuance of the express permission expressly stated by the Appellate Court in its supplementary opinion dated December 23, 1957, in this case, and does now, in pursuance of such express permission, determine this question presented on these motions and the question of liability by construing and supplementing the findings already made at the former trial and now and since then of record in this case and without further trial as to additional evidence for the reasons

already stated among others, and one very substantial reason particularly is the exhaustive, lengthy trial and great amount of time and effort in the trial already had in this case, and because the Court cannot conceive that any material fact or circumstance relating to this transaction that could influence this Court's decision has been left out of the record already made.

* * * * *

[Endorsed]: Filed August 18, 1958.

[Title of District Court and Cause.]

ORDER DENYING PLAINTIFF'S MOTION
FOR REHEARING AND RECONSIDER-
ATION OF SUMMARY JUDGMENT MO-
TIONS

The plaintiff United States of America having moved for rehearing and reconsideration and reargument of the motions for summary judgment granted on the 11th day of July, 1958 and entered on the 14th day of July, 1958 in favor of the defendants Donald F. Owens, Arthur G. Barnett and Edward R. Ester, and their respective marital communities, and defendant Virgil J. Pague, and the court having considered said motion and the affidavits in support thereof and the memorandum in support thereof, and having considered the affidavits and memorandum in opposition thereto, and all counsel for the respective parties being present, the court being fully advised in the premises, it is hereby

Ordered that plaintiff's motion for rehearing and re-argument of the motion for summary judgment be, and the same hereby is, denied, and the said Order granting summary judgment on the date that it was signed was then, and is now, intended to be a final judgment except as to all questions as to liability of all parties herein for the payment of the fee of the special master.

One in Open Court this 22nd day of August, 1958.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ ARTHUR G. BARNETT,
Attorney for Barnett & Owens,
et ux.

Approved for entry:

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,
Attorneys for Virgil J. Pague and Century Investment Corporation.

/s/ WARREN A. DOOLITTLE,
Attorney for Edward R. Ester,
et ux.

Approved as to form:

/s/ JOSEPH C. McKINNON,
Assistant U. S. Attorney.

[Endorsed]: Filed August 22, 1958.

In the United States District Court, Western
District of Washington, Northern Division

Court Room No. 1, Monday, September 15, 1958

Hon. John C. Bowen, U. S. District Judge presiding.

Pursuant to the order of adjournment, Court convenes at 10:00 A.M., Monday, September 15, 1958, and hears the following matters:

[Title of Cause.]

HEARING AND TRIAL

Now on this 15th day of September, 1958, this cause comes on before the Court for further hearing on Special Master's fee.

A full hearing is had. Thereupon the Court rules that the Special Master's fee and expenses are binding alike on each all of the litigants to the action. \$2500.00 is allowed the Special Master, together with his expenses of \$83.00. The Court rules that the United States of America pay one-fourth of the amounts allowed, or \$645.75; that three-fourths or \$1937.25 be jointly and severally paid by the defendants.

Mr. Iversen's oral motion to dismiss Century Investment Corporation is denied and it is so ordered.

At 5:05 P.M. Court is in recess. At 5:19 P.M. Court is again in session and the trial pursuant to the mandate of the Circuit Court of Appeals gets under way as to Century Investment Corporation

only; this court having heretofore dismissed the other defendants.

Edgar S. Ramon and Alfred P. Benson are sworn and testify for and on behalf of the Government.

At 6:14 P.M. the Government rests.

Mr. Iversen moves to dismiss. The motion is denied.

The defendant, Century Investment Corporation, has no evidence.

Both sides rest.

Counsel argue the cause on the merits. The Court renders its oral decision: That the United States of America recover from the Century Investment Corporation the sum of \$15,000.00 and the plaintiff's taxable costs.

Findings of fact, conclusions of law and judgment are to be presented September 22, 1958 at 2:00 P.M. Joseph C. McKinnon, Assistant United States Attorney, appears for the plaintiff, Lyle L. Iversen, Arthur G. Barnett, Warren A. Doolittle and A. J. Westberg appear for the defendants.

Journal 52, Page 683.

[Title of District Court and Cause.]

EXCEPTIONS OF CENTURY INVESTMENT CORPORATION TO PROPOSED FIND- INGS OF FACT AND CONCLUSIONS OF LAW

Century Investment Corporation excepts to the proposed Findings of Fact and Conclusions of Law on the trial of the case after remand for the following reasons:

1. Exception is taken to Paragraphs I through VIII inclusive, for the reason that they are repetitious of matters found in the preceding trial and do not pertain to any matter concerning which evidence was taken at the new trial and relate solely to matters that have become settled and concluded by previous findings of the Court.

2. Exception is taken to Paragraph IX for the reason that it is not supported by any testimony either at the previous trial or at the trial following the remand and is solely argumentative and does not relate to any matter that would bear upon any legal measure of damages.

3. Exception is taken to Paragraph X insofar as it contains the following language:

“* * * and by its actions has made it impossible for the plaintiff United States of America to have the buildings removed and the site restored, thereby causing plaintiff United States of America substantial damages.”

Said statement is not sustained by any facts testified to or evidence introduced and is contrary to the testimony in this case. Exception is further taken to the statement that the United States was caused substantial damages for the reason that no evidence has been introduced to establish any damages by any measure recognized in the law and said statement is merely a conclusion of law which is not based upon the evidence.

4. Exception is taken to Paragraph XI for the reason that the same is not based upon any evi-

dence and is fully argumentative and irrelevant.

5. Exception is taken to Paragraph XII for the reason that the same is not supported by the evidence which is undisputed to the effect that the buildings were vacated prior to the time that any contract was entered into with Century Investment Corporation, and further for the reason that said finding relates to matters not relevant to any issue concerning the contract in this case but relates solely to speculative matters concerning possible other uses of the building that might have been made had the government not elected to enter into a contract for their sale and the same does not relate to any legal measure of damages in this case.

6. Exception is taken to Paragraph XIII for the reason that the same undertakes to make new findings on matters concluded by the previous findings of the Court and is argumentative and undertakes to make findings of matters which were disposed of upon the previous appeal of this cause and which are irrelevant to any matter now before the Court on the issue of damages and do not relate to any legal measure of damages. Exception is further taken for the reason that the matter contained in Paragraph XIII is not based upon any evidence introduced or testimony heard by the Court at this trial.

7. Exception is taken to Paragraph XIV for the reason that the same relates to net profit which was a matter rejected by the Circuit Court of Appeals as a proper consideration for measuring the dam-

ages in this case and the same is irrelevant and incompetent and does not pertain to any legal measure of damages or any matter now before the Court.

8. Exception is taken to Paragraph XV for the same reason as was stated with respect to Paragraph XIV.

9. Exception is taken to Paragraph XVI for the same reason as was stated with respect to Paragraph XIV.

10. Exception is taken to Paragraph XVII for the reason that the same is not based upon any evidence adduced at this trial and relates to matters concerning which the facts were fully found at the previous trial.

11. Exception is taken to Paragraph XVIII for the reason that there is no evidence to support the same and the amount of \$15,000.00 mentioned therein is not based upon any legal measure of damages or any testimony or evidence presented at either the previous or the present trial.

12. Exception is taken to Paragraph XIX for the reason that the same indicates that the findings previously made are modified herein whereas the same have become the settled and accepted facts of the case and the law of the case.

13. Exception is taken to Paragraph XX insofar as it purports to find that three-fourths ($3/4$) of the amount of the master's fee should be paid by defendants since the same is a conclusion of law and was arrived at contrary to the order of the Circuit Court of Appeals.

14. Exception is taken to Paragraph I of the Conclusions of Law for the reason that the same is not based upon any competent findings nor upon any legal measure of damages nor upon any evidence or matter of which the Court could take judicial knowledge in this case.

15. Exception is taken to Paragraph II of the Conclusions of Law for the reason that the same is contrary to the decision of the Circuit Court of Appeals and undertakes to require the defendants herein to pay for the cost of the error committed at the instance of the plaintiff and over the objection of the defendants and is not based upon any legal finding.

/s/ By LYLE L. IVERSEN,
LYCETTE, DIAMOND &
SYLVESTER,
Attorneys for Century Investment
Corporation.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 22, 1958.

[Title of District Court and Cause.]

EXCEPTION OF CENTURY INVESTMENT COMPANY TO PROPOSED JUDGMENT

Century Investment Corporation objects to the proposed Judgment as follows:

1. Exception is taken to Paragraph 2 of the Judgment for the reason that the award of \$15,000.00 damages is not based upon any competent finding of fact or upon any evidence.

2. Exception is taken to Paragraph 3 for the reason that the same is contrary to the action of the Circuit of Appeals and undertakes to require the defendants to pay three-fourths (3/4) of the cost of the error of this Court in requiring an accounting which was brought about at the sole instance of the plaintiff and over the objection of the defendants.

/s/ By LYLE L. IVERSEN,
LYCETTE, DIAMOND &
SYLVESTER,
Attorneys for Century Investment
Corporation.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 22, 1958.

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANTS BARNETT
AND OWENS TO THE PLAINTIFF'S PRO-
POSED FINDINGS OF FACT, CONCLU-
SIONS OF LAW AND JUDGMENT

These defendants object to plaintiff's proposed Findings of Fact and Conclusions of Law and Judgment upon the following grounds:

1. These defendants were not parties to the trial held on September 15, 1958. Any findings based on the trial held on said date are not applicable to these defendants and the inclusion of these defendants in said findings only serves to create confusion by the co-mingling of the parties.

2. These defendants were dismissed by an Order Granting Summary Judgment on July 11, 1958, entered July 14, 1958, in which order the court reserves only the question of liability on the master's fee. Thus, it is not necessary that these defendants be included in the proposed pleadings, most of which do not involve the master.

3. The trial held on September 15, 1958 was restricted by the remand from the Circuit of Appeals to a cause of action against the Century Investment Corporation based on breach of contract and these defendants are not involved either as parties or under the cause of action.

4. The proposed pleadings of the plaintiff are contrary to the instructions of the court to the attorney for the special master to prepare a final order granting the fee of \$2500.00 to the master and charging the parties therefor. Consequently paragraph XX on page 9 of the proposed findings is in conflict with the order prepared and served by the master; and, furthermore, is unnecessary inasmuch as under Rule 53(a), Federal Rules of Civil Procedure, provision is made for the entry of a separate final order allowing a master's compensation.

5. Paragraph II of the Conclusions of Law is subject to the same objection stated in paragraph 4 herein.

6. Said proposed findings and conclusions, as they effect these defendants, are contrary to the

opinion of the Circuit Court of Appeals for the Ninth Circuit which held that the former findings and supplemental findings could not support the judgment based thereon in two respects because:

a. Barnett, Owens and Ester were not parties to the contract sued upon;

b. The theory of damages based on net rentals was erroneous in law.

Thus, paragraph XIX of the proposed findings, which attempts to reaffirm the former findings constitutes error in law.

7. The references to defendants Barnett, Owens and Ester contained in findings XIII (page 7), XV and XVI (page 8), are objected to for the reasons set forth in paragraphs 1, 2, 3 and 6 herein.

8. These defendants object to the proposed judgment on the ground that it is unnecessary as to them, that there is a previous final order which has been entered dismissing these defendants and that their inclusion in the said judgment confuses the record, and that they were not parties to the trial on September 15, 1958, and by this reference incorporates as further objections to the judgment paragraphs 2, 3, 4, 6 and 7 set forth as objections to the proposed findings of fact and conclusions of law.

/s/ ARTHUR G. BARNETT,
Attorney for Defendants
Barnett and Owens.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANTS BARNETT
AND OWENS TO THE ORDER FIXING
COMPENSATION AND EXPENSES OF
SPECIAL MASTER AND CHARGING RE-
SPONSIBILITY THEREFOR

These defendants have no objection to the form of the order but do object to the entry of the order on the following grounds:

1. That the same is inconsistent with the decree of the Circuit Court of Appeals which held that the theory of damages based upon net rentals constituted error at law. Consequently the court of appeals reversed the judgment awarding the master's compensation inasmuch as the reference was an error at law. The Circuit Court of Appeals would have dismissed all parties except Century Investment Corporation except that said Court of Appeals was uncertain about findings of the trial court. The trial court construed its own findings and dismissed these defendants. The plaintiff is entirely responsible for the erroneous reference; that there was no benefit to these defendants and it is submitted that it is error to reinstate the master's compensation which was reversed as to these defendants.

Furthermore, the master's compensation chargeable against the plaintiff was not reversed.

/s/ ARTHUR G. BARNETT,
Attorney for Defendants
Barnett and Owens.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANT ESTER TO
THE PLAINTIFF'S PROPOSED FIND-
INGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

Defendant Edward R. Ester, and wife, object to the Plaintiff's proposed Findings of Fact, Conclusions of Law and Judgment upon each and all of the same grounds set forth in the objections of defendants, Barnett and Owens, which are incorporated herein by reference as if set forth in full.

/s/ WARREN A. DOOLITTLE,
Attorney for Defendant
Edward R. Ester, and wife.

[Endorsed]: Filed September 29, 1958.

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANT ESTER TO
THE ORDER FIXING COMPENSATION
AND EXPENSES OF SPECIAL MASTER
AND CHARGING RESPONSIBILITY
THEREFOR

Defendant Edward R. Ester, and wife, have no objections to the form of the Order, but do object to the entry of the Order on each and all of the grounds set forth in the objections of Defendants, Barnett and Owens, which are incorporated herein by reference as if set forth in full; and in addition, object on the grounds that it is unfair and inequitable that the liability of the defendant for his share of the Master's compensation and expenses be a joint liability, it being the contention of these defendants that such liability (which is objected to) should be only a several liability of the defendants and not both joint and several.

/s/ WARREN A. DOOLITTLE,
Attorney for Defendant
Edward R. Estes, and wife.

[Endorsed]: Filed September 29, 1958.

[Title of District Court and Cause.]

ORDER FIXING COMPENSATION AND EXPENSES OF SPECIAL MASTER AND CHARGING RESPONSIBILITY THEREFOR

This Matter coming on regularly for hearing on this 29th day of September, 1958, at the time fixed by the Court for the settlement of this order; the plaintiff, United States of America, appearing by Charles P. Moriarty, District Attorney, and Joseph C. McKinnon, Assistant District Attorney; the defendants, Century Investment Corporation and Virgil J. Pague, appearing by Lycette, Diamond & Sylvester and Lyle L. Iversen; the defendants, Barnett and Owens, appearing by Arthur G. Barnett of their counsel; the defendant, Ester, appearing by McMicken, Rupp & Schweppe and Warren A. Doolittle; and the Special Master appearing by Bayley, Fite, Westberg & Madden (A. J. Westberg of counsel) and the Court having considered all the evidence submitted relating to the services of the Special Master and the value thereof and the expenses incurred by him in the performance of the duties assigned to him by the Court, and having considered the Memoranda submitted by the respective counsel, and the Court having further found that the reference to the Special Master and his appointment were proper under all of the circumstances of the case and within the provisions of Rule 53 of the Federal Rules of Civil Procedure; the Special Master having completed his services and filed herein his report and supplemental report;

and the Court having further found that the services of the Special Master were of value to this Court and to each of all of the parties hereto, and the Court having further found that it has jurisdiction over all of the parties hereto for the purpose of charging against said parties the compensation and expenses of the Special Master under the provisions of Rule 53, and the Court being fully advised in the premises;

It Is Hereby Ordered and Adjudged that a fair, just and reasonable fee for his services as Special Master herein is hereby awarded to Don S. Griffith in the sum of Twenty-Five Hundred (\$2,500.00) Dollars together with Eighty-three (\$83.00) Dollars incurred by him for the services for a court reporter; that one-fourth of said amounts in the sum of Six Hundred Forty-five and 75/100ths (\$645.75) Dollars shall be paid by plaintiff and three-fourths of said amounts in the sum of One Thousand Nine Hundred Thirty-seven and 25/100ths (\$1,937.25) Dollars shall be paid by the defendants, Century Investment Corporation; Virgil J. Pague; Arthur G. Barnett and the marital community composed of Arthur G. Barnett and Virginia N. Barnett, his wife; Donald F. Owens and the marital community composed of Donald F. Owens and Jean Owens, his wife; Edward R. Ester and the marital community composed of Edward R. Ester and Lorraine M. Ester, his wife, and each and all of them and in this regard the defendants' obligation is joint and severally, and if the defendants do not pay the share of compensation and expenses herein charged to

them within 60 days from date hereof, the Master may have execution against any or all of them for the same.

Done in Open Court this 29th day of September, 1958.

/s/ JOHN C. BOWEN

Judge.

Presented By:

/s/ A. J. WESTBERG,

Of Bayley, Fite, Westberg & Madden, Attorneys
for Special Master.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 29, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause, having been remanded to this Court by the Court of Appeals for the Ninth Circuit for the purpose, among others, of a trial on the issue of damages only as between the plaintiff and defendant, Century Investment Corporation, and having duly come on for such trial before the undersigned Judge of the above-entitled Court on the 15th day of September, 1958, the plaintiff United States of America being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and Joseph C. McKinnon, Assist-

ant United States Attorney for said District, and defendant Century Investment Corporation being represented by Lycette, Diamond & Sylvester and Lyle L. Iversen, and witnesses having been sworn, testimony taken and evidence adduced, and the Court having considered all such evidence adduced at the said trial theretofore held before the same Judge from the 7th to the 17th days of September, 1955, and the Court having also given due consideration to the report of the Special Master filed herein, the arguments and briefs of counsel, the pleadings and all other matters of record herein, and being fully advised in the premises, now makes the following:

Findings of Fact

I.

That prior to June 22, 1953, the Administrator of the Public Housing Administration, an agency of the Housing and Home Finance Agency of the United States of America, plaintiff herein, through his duly authorized representatives and through the Housing Authority of the City of Seattle, an agency of the City of Seattle, Washington, issued a general invitation to the public to submit sealed bids for the sale and removal of ten temporary war housing buildings, containing 144 dwelling units, and for the clearance of the real estate sites upon which said buildings were then located; said temporary dwelling buildings are designated by the Public Housing Administration and in said invitation to bid as buildings numbers 101 through 110 consecu-

tively, of project Wash-45302 and are located in the City of Seattle, within the Northern Division of the Western District of Washington; that in issuing said invitation and in entering into the contract, hereinafter referred to, the Public Housing Administration was effectuating the requirements of Section 313 of the Lanham Act, hereinafter referred to.

II.

That by condemnation proceedings entitled *United States v. Certain parcels of land in King County, Washington, et al.*, Civil No. 1143 of this court, the United States of America acquired the exclusive use of the real estate, excluding street areas of the City of Seattle, underlying said buildings 101 through 110 of project Wash-45302, under authority granted by the Lanham Act, P.L. 849, 76th Congress as amended; 54 Stat. 1125, 42 U.S.C. 1521 et seq., for the purpose of erecting temporary war housing thereon; that following the taking of said land, temporary war housing project Wash-45302 was erected thereon by the Public Housing Administration; the term of such excluded use was from year to year. The United States of America had the right to renew annually, but not beyond June 30, 1956, and the United States of America did elect to renew from time to time to permit its continued possession of the land to and including June 30, 1956, but did not make timely payment of all of the real estate taxes which were assessed on the land for the years 1954, 1955 and 1956, and this Court during the trial of this cause took judicial notice

of cause No. 1143 and of all of the proceedings and files and records therein.

III.

That pursuant to said invitation, sealed bids were received, and opened by the Housing Authority, City of Seattle, on June 22, 1953; the bid of one A. E. Sherman was the highest bid submitted; that said bids were forwarded to the Public Housing Administration and, thereafter that department of the plaintiff herein, advised the Housing Authority, City of Seattle that the bid of A. E. Sherman would be accepted and that the Housing Authority, City of Seattle, was authorized to collect the difference between the amount of said bid and the bid deposit.

IV.

That A. E. Sherman submitted said bid under the direction, supervision and at the request of one Virgil J. Pague, defendant herein, his then employer; that the said Pague determined that said bid be submitted, the amount of said bid and supplied the money required for the bid deposit and used the name and services of A. E. Sherman because Sherman was a man of small means while he, Pague, had substantial assets, so that in the event of any subsequent trouble concerning said buildings, the financial assets of the said Virgil J. Pague would be protected; that defendant Virgil Pague was not an original party to the contract with defendant Century but did, with Sherman's assistance, negotiate the contract.

V.

That on July 3, 1953, pursuant to notice, the balance of the purchase price due on said sale was tendered to the Housing Authority, City of Seattle, at its office at 825 Yesler Street, Seattle, Washington, and in particular, to one Louis Michaelson, an employee of said organization who was the principal individual with whom the public dealt concerning the sale and removal of buildings and site clearance at project Wash-45302; that said payment was tendered by A. E. Sherman who, at said time and place advised the said Michaelson that said payment was tendered in behalf of the defendant, Century Investment Corporation, a proposed corporation and then in the preliminary stages of incorporation, and to which A. E. Sherman assigned his interest in said bid, and that the incorporators of same were Virgil J. Pague, Defendant herein, and the same individual referred to in paragraph IV hereof, Albert A. Rontai and Orville Cohen; that at said time and place the contract with the plaintiff herein, was prepared in the name of Century Investment Corporation and thereafter forwarded with the balance of the purchase price to the Public Housing Administration for approval and execution.

VI.

That on July 14, 1953, said contract for sale and off-site removal of temporary war housing buildings and site clearance at project Wash-45302 (attached hereto as Exhibit A and made part hereof), was executed by the Contracting Officer for the Public

Housing Administration, and thereafter delivered to the Century Investment Corporation; that the details of completing incorporation were not accomplished and the articles of incorporation of the Century Investment Corporation were not filed with the Secretary of the State of Washington until July 17, 1953, but thereafter and prior to August 21, 1953, the said corporation actively entered upon the work of completing said contract by retaining A. E. Sherman as its sales agent, selling and removing buildings and clearing the sites from which buildings were being removed.

VII.

That concerning the sale of project Wash-45302, the Housing Authority of the City of Seattle and Louis Michaelson, its employee, were granted the limited authority by the Public Housing Administration to attend to the administrative details of same in publishing notices of invitation to bid, and in distributing contract literature as supplied to them by the Public Housing Administration and in accepting and opening sealed bids, and in notifying the successful bidder when authorized to do so by the Public Housing Administration, and in attending to the details of the contract execution by the purchaser; that each and all of the defendants who dealt with the Housing Authority of the City of Seattle at the time said contract was made knew, and now knows that said organization is and was a wholly difference organization from that of the Public Housing Administration of the United States of America.

VIII.

That on or about November 12, 1953, the time of performance of the condition of said contract that buildings be removed and sites cleared was extended by the Housing Authority, City of Seattle, on request therefor by Century Investment Corporation, to January 15, 1954; that defendant Hartford Accident and Indemnity Company received no notice of said extension or request therefor and did not approve said extension which was granted at a time when the Housing Authority, City of Seattle had knowledge that buildings numbered 102 and 103 of project Wash-45302 were being offered for rental, on site, to the public contrary to the spirit and plain meaning of said contract.

IX.

That the purpose sought to be achieved by the plaintiff United States of America in entering into the said contract with Century Investment Corporation was the removal of the buildings and the restoration of the site, and plaintiff United States of America paid the said Century Investment Corporation a good and valuable consideration for such service, by transferring title to the said buildings to the said Century Investment Corporation in consideration of a sum of money substantially less than the on-site value of the buildings, and of the agreement of Century Investment Corporation to remove the buildings within the period of time designated in the agreement.

X.

That Century Investment Corporation has never removed buildings 102, 103, 104 and 105, and by its actions has made it impossible for plaintiff United States of America to have the buildings removed and the site restored, thereby causing plaintiff United States of America substantial damages.

XI.

That buildings 102, 103, 104 and 105 still remain on the site and are still occupied as dwelling units at that place, contrary to the provisions of the contract and the intent of the parties to the contract, although plaintiff, in consideration of defendant Century Investment Corporation's promise to remove the buildings from the site and clear the land upon which the buildings had stood, sold those buildings to that defendant for a total sum of \$8,694.00 when they had a total on-site value of \$132,636.58.

XII.

That prior to June 1, 1953, plaintiff caused the dwelling units in the said buildings 102 through 105 to be vacated although they were then substantially fully rented at a profit to the plaintiff, and if plaintiff had not caused the buildings to be vacated in contemplation of a contract for their removal, the plaintiff could have continued to rent the dwelling units in Buildings 102 through 105 from June 1, 1953 through June 30, 1956 at a profit of not less than \$750.00 per month; there being 54 such dwelling units in such buildings which could have been

kept approximately 95% rented during such period of time at a monthly rental of \$42.00 for each unit, with the expense of operating each unit totaling not more than \$27.00 per month.

XIII.

That defendant Virgil J. Pague operated Buildings 102 and 103 as commercial apartment houses from September 1, 1953 to June 30, 1956 and received net income from such operations, which is not necessarily the same income as the plaintiff would have received if it had continued to rent the buildings as individual apartments for the reason that during part of that period the buildings were so remodeled as to justify different rentals, and similarly, defendant marital communities of Barnett and Owens operated Building 104 as a commercial apartment house from June 1, 1954 through June 30, 1956, at a profit which is likewise not entirely comparable to the profit which plaintiff United States might have received from continued operation of the building because those marital communities had caused remodeling of the building which justified changes in rent, and the marital community of Edward R. Ester and his wife having remodeled Building 105 caused it to be rented as apartments from May 1, 1954 through June 30, 1956 at a rental which is for the same reason not entirely comparable to the amount which the plaintiff United States would have received from continuing the operation of the building as an apartment house without remodeling.

XIV.

That from September 1, 1953 to November 16, 1955, Virgil J. Pague's net profit from the rental of apartments in Buildings 102 and 103, after deduction for depreciation, land rental, and all operating expenses, was \$6,765.13; which profitable operation continued from November 16, 1955 through June 30, 1956, although the exact amount of profit for the latter period has not been computed.

XV.

That defendant marital communities of Barnett and Owens operated Building 104 from June 1, 1954 to November 16, 1955 with a net profit of \$5,282.81, after deduction of all expenses including depreciation and continued similar profitable operation during the period November 16, 1955 through June 30, 1956, although the exact amount of the profits for the latter *prior* has not been computed.

XVI.

That the marital community of Edward R. Ester and wife operated Building 105 from May 1, 1954 to November 16, 1955 at a net profit of \$3,764.59, after deductions for all expenses including depreciation, and continued similar profitable operation from November 16, 1955 through June 30, 1956, although the exact amount of profit for the latter period has not been computed.

XVII.

That on and after August 21, 1953, defendant Century Investment Corporation purported to con-

vey four buildings in project Wash-45302, namely buildings 102, 103, 104, and 105, comprising 54 dwelling units, without imposing the condition or obligation that they be removed from site; that all said four buildings, at the present time, are situated on the sites where they were first constructed as temporary war housing buildings by the Public Housing Administration, and are presently being used for private commercial dwelling purposes and are occupied by paying tenants.

XVIII.

That from all of the evidence, the Court finds that the damage to the United States foreseeably resulting from the said breach of contract by defendant Century Investment Corporation, has a monetary value of \$15,000.*

XIX.

That so far as concerns defendant Century Investment Corp. and plaintiff the Findings of Fact and Conclusions of Law entered herein on October 20, 1955 and on April 26, 1956, are reaffirmed in their entirety, except that they are modified only as to the specific details enumerated herein.

* That in these Findings this Court does not deal with the evidence or subject of trespass and/or implied contract because the only defendants concerned with those issues have heretofore been dismissed from this action and because as to trespass that was decided against plaintiff and in favor of defendant at the first trial and no evidence in the record at this time justifies a different result.

XX.

The order separately entered herein this date respecting the compensation and expenses of the Special Master and responsibility therefor is hereby in all respects confirmed. That any and all other costs incurred in this action shall be paid by the parties incurring same.

Done in Open Court this 29th day of September, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

And from the foregoing, the Court now makes and enters the following:

Conclusions of Law

I.

That the plaintiff is entitled to judgment against defendant Century Investment Corporation in the sum of \$15,000.

II.

The order separately entered herein this date respecting the compensation and expenses of the Special Master and responsibility therefor is hereby in all respects confirmed. That all other costs incurred in this action shall be paid by the parties incurring same.

III.

That no award herein made or directed shall bear interest prior to the date of entry of final judgment herein.

Done in Open Court this 29th day of September,
1958.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved:

/s/ By JOSEPH C. McKINNON,

Assistant U. S. Attorney.

Certificate of Service by Mail Attached.

[Endorsed]: Filed September 29, 1958.

United States District Court, Western District
of Washington, Northern Division

No. 3804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, a
corporation; HARTFORD ACCIDENT & IN-
DEMNITY COMPANY, a corporation; A. E.
SHERMAN and JANE DOE SHERMAN, his
wife; VIRGIL J. PAGUE and JANE DOE
PAGUE, his wife; CARL W. PAGUE and
JANE DOE PAGUE, his wife; ARTHUR G.
BARNETT and JANE DOE BARNETT, his
wife; EDWARD R. ESTER and JANE DOE
ESTER, his wife; and DONALD P. OWENS
and JANE DOE OWENS, his wife,

Defendants.

JUDGMENT

Summary Judgment having heretofore been
granted in favor of defendants Virgil J. Pague,
Arthur G. Barnett and Virginia M. Barnett, his

wife; Donald F. Owens and Jean Owens, his wife; Edward R. Ester and Lorraine M. Ester, his wife; but the Court having retained jurisdiction of those defendants for the sole purpose of considering their possible obligation to pay some part of any award which might be made to the Special Master and the Court having this day duly made an order directing payment of a reasonable fee plus disbursements to the Special Master by those defendants and by plaintiff and by defendant Century Investment Corporation in amounts set forth in detail in that order; and a further trial on the issue of the damages caused to the United States of America as a foreseeable result of the breach of contract by defendant Century Investment Corporation having been held on September 15, 1958, and this matter having come on for entry of Judgment, this day, and the plaintiff United States of America being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington and Joseph C. McKinnon, Assistant United States Attorney; and defendants Century Investment Corporation and Virgil J. Pague being represented by Lycette, Diamond & Sylvester and Lyle L. Iversen; and defendants Arthur G. Barnett and Virginia M. Barnett, his wife, and Donald P. Owens and Jean Owens, his wife, being represented by McCann, Barnett & Towne and Arthur G. Barnett; and defendants Edward R. Ester and Lorraine M. Ester, his wife, being represented by McMicken, Rupp & Schweppe and Warren A. Doolittle; and the Court having this day entered its Findings of Fact and

Conclusions of Law, does now, therefore, being fully advised in the premises,

Order, Adjudge and Decree as follows:

1. That the complaint of the plaintiff as against all defendants other than defendant Century Investment Corporation be, and the same hereby is in all respects finally dismissed.

2. That the plaintiff is hereby awarded reasonable damages and judgment against the defendant Century Investment Corporation in the sum of Fifteen Thousand Dollars (\$15,000.00).

3. That the order separately entered herein this respecting the compensation and expenses of the Special Master and responsibility therefor is hereby in all respects confirmed.

4. Each party shall pay his, its and/or their own costs, and no party is to pay the costs of any other party, provided this paragraph shall not in any way affect the Special Master's compensation and expenses hereinabove and in the findings and conclusions referred to.

5. That each and all of the cross-complaints brought by one or more of the defendants against the plaintiff herein are hereby dismissed.

Done in Open Court this 29th day of September, 1958.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved by:

/s/ JOSEPH C. McKINNON,

Assistant U. S. Attorney.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 29, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF CENTURY
INVESTMENT CORPORATION

Notice Is Hereby Given that Century Investment Corporation, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment entered against it in the above-entitled action on or about the 29th day of September, 1958, and from the whole thereof. This defendant further appeals from the Order Fixing Compensation and Expenses of Special Master and Charging the Responsibility Therefor, entered in the above-entitled action on or about the 29th day of September, 1958. Said further Appeal being from so much of said order as charges Century Investment Corporation with the part of the cost of the special master.

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,
Attorneys for Century Investment
Corporation.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 20, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF
VIRGIL J. PAGUE

Notice Is Hereby Given that Virgil J. Pague appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor. This appeal is from so much of said order as charges a portion of the compensation and expenses of the Special Master to Virgil J. Pague.

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Virgil J. Pague.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 20, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS

Know All Men By These Presents:

That we, Century Investment Corporation, as Principal, and the Fidelity and Deposit Company of Maryland as Surety, are held and firmly bound unto United States of America, its executors, administrators, or assigns, in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, lawful money of the United States of America, to be paid unto the said United States of America, its executors, administrators, or assigns, to which payment well and

truly to be made, it do bind and oblige itself, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26th day of November, 1958.

Whereas, the above-named United States of America commenced an action in United States District Court, in and for the Western District of Washington, against the said Defendants above named, and on September 29, 1958 procured a judgment against Century Investment Corporation for \$15,000.00 and said Century Investment Corporation desires to appeal.

Now Therefore, The Condition of This Obligation Is Such, That if the above-named Century Investment Corporation shall well and truly pay all costs that may be awarded against it on the appeal or on the dismissal thereof not exceeding the penalty of this bond in the aggregate, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed and sealed this 26th day of November, 1958.

CENTURY INVESTMENT
CORPORATION,

/s/ By VIRGIL J. PAGUE,
President.

[Seal] FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

/s/ By GUERTIN CARROLL,
Attorney-in-Fact.

[Endorsed]: Filed November 26, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF PLAINTIFF,
UNITED STATES OF AMERICA

Notice Is Hereby Given that United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 30, 1958, this appeal being from each and every part of the said Judgment except that part of the Judgment respecting the compensation and expenses of the Special Master and responsibility therefor. Plaintiff, United States of America, further appeals from the Order, made in this action on July 11, 1958 and entered on July 14, 1958, granting summary judgment in favor of defendants, Donald F. Owens, Arthur G. Barnett and Edward R. Ester and their respective marital communities and in favor of defendant, Virgil J. Pague, and from each and every part of the said Order except so much of the said Order as denied summary judgment in favor of defendant, Century Investment Corporation. Plaintiff, United States of America, further appeals from the Order entered in this action on August 22, 1958 denying the motion of the plaintiff, United States of America, for rehearing and reconsideration of the motions for summary judgment which were determined by the

Order of July 11, 1958 which was entered in this action on July 14, 1958.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ JOSEPH C. McKINNON,
Assistant U. S. Attorney.

[Endorsed]: Filed November 28, 1958.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men By These Presents:

That We, Virgil J. Pague, One of the Defendants Above Named, As Principal, and Fidelity and Deposit Company of Maryland, a Maryland Corporation Authorized to do and Doing Business In Each State In The Union, As Surety, Are Held and Firmly Bound Unto The Special Master Don S. Griffith In The Sum of Two Thousand and No/100 (\$2,000.00) Dollars, For Which Sum Well and Truly to Be Paid, The Undersigned Principal and Surety Bind Themselves, Their Heirs, Executors, Administrators, and Assigns, Jointly and Severally, Firmly By These Presents.

Whereas, The Principal Above Named Is Desirous of Appealing From That Certain Order Filed and Entered On the 29th Day of September, 1958 Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor, and Are

Filing This Bond On Appeal to The United States Circuit Court of Appeals For The Ninth Circuit.

Now, Therefore, The Condition of The Above Obligation Is Such That If The Said Principals Shall Prosecute Their Appeal to Effect and Satisfy The Said Judgment In Full, Together With Costs, Interest and Damages For Delay If For Any Reason The Appeal Is Dismissed, Or If The Judgment Is Affirmed and Satisfy In Full, Such Modification of The Judgment and Such Costs, Interest and Damages As The Appellate Court May Adjudge and Award, Then This Obligation Shall Be Void; Otherwise to Remain In Full Force and Effect.

Signed, Sealed and Dated This 26th Day of November, 1958.

/s/ VIRGIL J. PAGUE.

[Seal] FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

/s/ By LUCIAN W. HIMES,
Attorney in Fact.

Presented and Approved by:

/s/ MEADE EMORY,

Of Counsel for Century Investment
Corporation.

Approved as to form:

McMICKEN, RUPP & SCHWEPPE,

/s/ By (Illegible),

Attorneys for Edward R. Ester.

Approved as to form and amount November 28,
1958.

/s/ ARTHUR G. BARNETT,
Attorney for Barnett and Owens.

Approved as to form and amount November 26,
1958.

/s/ By A. J. WESTBERG,
Attorney for Special Master.

/s/ JOSEPH C. McKINNON,
Assistant U. S. Attorney, who also
approved sufficiency of the surety.

Bond Approved:

/s/ JOHN C. BOWEN,
Judge.

[Endorsed]: Filed November 28, 1958.

[Title of District Court and Cause.]

NOTICE OF JOINT APPEAL BY EDWARD
R. ESTER AND LORRAINE M. ESTER, his
wife; DONALD F. OWENS AND JEAN
OWENS, his wife, and ARTHUR G. BAR-
NETT AND VIRGINIA N. BARNETT, his
wife

Notice Is Hereby Given that Edward R. Ester
and Lorraine M. Ester, his wife; Donald F. Owens
and Jean Owens, his wife, and Arthur G. Barnett
and Virginia N. Barnett, his wife, appeal to the

United States Circuit Court of Appeals for the Ninth Circuit from the Order filed or entered on or about Sept. 29, 1958 Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor, insofar as said Order charges a portion of the compensation and expenses of the Special Master to them.

McMICKEN, RUPP & SCHWEPPE,
McCANN, BARNETT & TOWNE,
ARTHUR G. BARNETT, and
ALEC DUFF,

/s/ By ARTHUR G. BARNETT,
Attorneys for said Appellants.

[Endorsed]: Filed November 28, 1958.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men By These Presents:

That We, Arthur G. Barnett and The Marital Community of Him and Virginia V. Barnett, Donald F. Owens and The Marital Community of Him and Jean Owens, and Edward R. Ester, and The Marital Community of Him and Lorraine M. Ester, Certain of The Defendants Above Named, As Principal, and Fidelity and Deposit Company of Maryland, a Maryland Corporation Authorized to Do and Doing Business In Each State In The Union, As Surety, Are Held and Firmly Bound Unto The Special Master Don S. Griffith In The Sum of One

Thousand Nine Hundred Seventy-Five and No/100 (\$1,975.00) Dollars, For Which Sum Well and Truly to Be Paid, The Undersigned Principal and Surety Bind Themselves, Their Heirs, Executors, Administrators, and Assigns, Jointly and Severally, Firmly By These Presents.

Whereas, The Principals Above Named Are Desirous of Appealing From That Certain Order Filed and Entered On The 29th Day of September, 1958, Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor, and Are Filing This Bond On Appeal to The United States Circuit Court of Appeals For The Ninth Circuit.

Now, Therefore, The Condition of The Above Obligation Is Such That If The Said Principals Shall Prosecute Their Appeal to Effect and Satisfy The Said Judgment In Full, Together With Costs, Interest and Damages For Delay If For Any Reason The Appeal Is Dismissed, Or If The Judgment Is Affirmed and Satisfied In Full, Such Modification of The Judgment and Such Costs, Interest and Damages As The Appellate Court May Adjudge and Award, Then This Obligation Shall Be Void; Otherwise to Remain In Full Force and Effect.

Signed, Sealed and Dated This 25th Day of November, 1958.

McMICKEN, RUPP & SCHWEPPE,
McCANN, BARNETT & TOWNE,
ARTHUR G. BARNETT, and
ALEC DUFF,

/s/ By ARTHUR G. BARNETT,
Attorneys for said Appellants.

[Seal] FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
/s/ By GUERTIN CARRILL,
Attorney in Fact.

DONALD F. OWENS and
ARTHUR G. BARNETT, et al.,
/s/ By ARTHUR G. BARNETT,
Partner, and a Party.

EDWARD R. ESTER and
LORRAINE M. ESTER,
/s/ By EDWARD R. ESTER.

Approved as to Form and Amount November 28,
1958.

/s/ WILLIAM J. MADDEN,
Of Attorneys for Special Master.

Approved as to Form and Amount November 28,
1958.

/s/ MEADE EMORY,
Of Counsel for Century Investment
Corporation.

/s/ JOSEPH C. McKINNON,
Assistant U. S. Attorney, who also approved the
sufficiency of the surety.

Bond Approved:

/s/ JOHN C. BOWEN,
Judge.

[Endorsed]: Filed November 28, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY CENTURY INVESTMENT COR-
PORATION

Century Investment Corporation in its appeal will rely upon the following points:

1. Neither the findings nor the evidence support the judgment against this defendant.

2. Judgment against this defendant is not based upon any legally recognized measure of damages or any competent evidence of damages.

3. There is no legal authority to charge this defendant with the cost of the erroneous appointment of a special master.

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Century Investment
Corporation.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 2, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The United States of America, cross-appellant in the above-entitled case, makes the following statement of points on which it intends to rely upon appeal:

1. That the District Court erred in granting summary judgment in favor of the individual defendants and dismissing them from the action.

2. That the District Court erred in according only token relief to the United States though finding as a fact that it had been substantially damaged.

3. That the District Court erred in rendering and entering its judgment dated September 29, 1958 (entered September 30, 1958) against Century Investment Corporation in the sum of \$15,000.00 only, and finally dismissing all of the other defendants.

4. That the District Court erred in rendering and entering its interlocutory order dated July 11, 1958 (entered July 14, 1958) granting summary judgment in favor of Arthur G. Barnett, Edward R. Ester and Donald F. Owens and their respective marital communities, and in favor of defendant Virgil J. Pague, except so much of said order as denied summary judgment in favor of defendant Century Investment Corporation.

5. That the District Court erred in rendering and entering its order dated and entered August 22, 1958, denying the motion of the United States for rehearing and reconsideration of the motions for summary judgment which were determined by the order of July 11, 1958 entered July 14, 1958.

/s/ CHARLES P. MORIARTY,

United States Attorney,

/s/ JOSEPH C. McKINNON,

Assistant U. S. Attorney.

[Endorsed]: Filed December 23, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY VIRGIL J. PAGUE

Virgil J. Pague, on his appeal from the Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor will rely upon the following points:

1. It was error for the Court to assess the costs of an erroneous accounting against a party who objected thereto.

LYCETTE, DIAMOND &
SYLVESTER,

/s/ By LYLE L. IVERSEN,

Attorneys for Virgil J. Pague.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 3, 1958.

[Title of District Court and Cause.]

AMENDED STATEMENT OF POINTS TO BE
RELIED UPON BY JOINT APPELLANTS
EDWARD R. ESTER AND LORRAINE M.
ESTER, his wife; AND DONALD F. OWENS
AND JEAN OWENS, his wife, AND AR-
THUR G. BARNETT AND VIRGINIA BAR-
NETT, his wife

The above joint appellants on their joint appeal from the Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor will rely upon the following points:

It was error for the court to enter in said order

a joint and several judgment against these joint appellants for any portion of the fees and costs of the Special Master on the following grounds:

(a) The matter was *res judicata* under the decision of the Circuit Court of Appeals for the Ninth Circuit in cause No. 15219, as amended, entered on Dec. 23, 1957, and reported in 250 F 2 139;

(b) The action of the lower court is inconsistent with the opinion of said appellate court referred to in (a) immediately preceding this paragraph;

(c) It was error to assess any portion of the costs and fees of an erroneous accounting against a party objecting thereto;

(d) It was error to assess any portion of the costs and fees of an erroneous accounting prayed for and demanded by the plaintiff below and which was of no benefit to these joint appellants;

(e) The accounting was discriminatory, inconsistent and erroneous and the fee therefor was excessive;

(f) The findings of fact do not support the said order;

(g) The said findings of fact are not supported by the evidence or by any evidence.

McMICKEN, RUPP & SCHWEPPE,
McCANN, BARNETT & TOWNE and
ALEC DUFF,

/s/ By ARTHUR G. BARNETT,

Attorneys for Appellants Barnett,
Owens and Ester.

[Endorsed]: Filed February 9, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, John A. Burns, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, Rule 75(o) FRCP, and designation of counsel, I am transmitting herewith the following original documents and papers in the file dealing with the action together with true copies of journal entries and docket entries as requested, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit, said papers and documents being identified as follows:

180. Motion of Century Investment Corporation for Summary Judgment, filed 6-18-58.

181. Motion of Virgil J. Pague for Summary Judgment, filed 6-18-58.

183. Motion of Donald F. Owens and Arthur G. Barnett for Summary Judgment, filed 7-1-58.

186. Affidavit of Arthur G. Barnett in Support of Motion of Donald F. Owens and Arthur G. Barnett for Summary Judgment, filed 7-1-58.

187. Request of Special Master as to Pretrial Order, filed 7-2-58.

189. Motion of Edward R. Ester for Summary Judgment, filed 7-9-58.

191. Affidavit of Joseph C. McKinnon in opposition to motions for summary judgment made by defendants, filed 7-10-58.

193. Court Reporter's Transcript of Excerpts of Proceedings before District Judge Bowen on April 20-21, 1956, filed 7-10-58.

196. Order Granting Summary Judgment, filed July 11, 1958.

197. Motion for Rehearing and Reconsideration filed by Plaintiff July 22, 1958, with Exhibit A attached, together with Affidavit of Joseph C. McKinnon.

198. Affidavit of Lyle L. Iversen in Response to Motion for Rehearing and Reconsideration, filed July 25, 1958.

200. Affidavit of Joseph C. McKinnon in Reply to Affidavit of Lyle L. Iversen, Sworn to July 24, 1958, filed Aug. 14, 1958.

201. Affidavit of John A. Roberts, Jr., in Reply to Affidavit of Lyle L. Iversen in Support of Defendant Virgil J. Pague and Century Investment Corporation's Opposition to Motion for Rehearing and Reconsideration, filed 8-15-58.

202. Affidavit of Defendant Edward R. Ester in Opposition to Plaintiff's Motion for Rehearing and Reconsideration of Summary Judgment, filed 8-15-58.

204. Affidavit in Opposition to Motion for Rehearing and Reconsideration, by Arthur G. Barnett, filed 8-15-58.

205. Court Reporter's Transcript of Excerpts of

Proceedings before District Judge Bowen on July 10-11, 1958, filed Aug. 18, 1958.

207. Order Denying Plaintiff's Motion for Rehearing and Reconsideration of Summary Judgment Motions, filed Aug. 22, 1958.

216. Exceptions of Century Investment Corporation to Proposed Findings of Fact and Conclusions of Law, filed 9-22-58.

217. Exception of Century Investment Company to proposed Judgment, filed 9-22-58.

218. Objection to Settling Findings and Judgment at This Time, filed 9-22-58.

219. Objections of Special Master Don S. Griffith to Proposed Findings and Conclusions on Behalf of Special Master, filed 9-22-58.

220. Affidavit of Arthur G. Barnett re insufficient time to make objections to proposed Findings of Fact and Conclusions of Law, and Judgment, filed Sept. 22, 1958.

221. Affidavit of Warren A. Doolittle on behalf of Defendant Ester, Regarding Proposed Findings of Fact, Conclusions of Law, and Judgment, submitted by Plaintiff, filed 9-22-58.

222. Objections of Defendants Barnett and Owens to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Judgment, filed 9-25-58.

223. Objections of Defendants Barnett and Owens to the Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor, filed 9-25-58.

224. Objections of Defendant Ester to Plaintiff's

Proposed Findings of Fact, Conclusions of Law and Judgment, filed 9-29-58.

225. Objections of Defendant Ester to Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor, filed 9-29-58.

227. Order Fixing Compensation and Expenses of Special Master and Charging Responsibility Therefor, filed 9-29-58.

228. Findings of Fact and Conclusions of Law, filed 9-29-58.

229. Judgment, filed 9-29-58.

230. Notice of Appeal of Century Investment Corporation, filed 11-20-58.

231. Notice of Appeal of Virvil J. Pague, filed 11-20-58.

232. Bond for Costs filed by Century Investment Corporation Nov. 26, 1958, (\$250.00, F & D Co. of Maryland).

233. Notice of Appeal of Plaintiff, United States of America, filed 11-28-58.

234. Supersedeas Bond on Appeal, (Pague), \$2,000.00, F & D Co. of Maryland, filed 11-28-58.

235. Notice of Joint Appeal by defendants Ester, Owens and Barnett, filed 11-28-58.

236. Supersedeas Bond on Appeal, Ester, et al, \$1975.00, F & D Co. of Maryland, filed 11-28-58.

237. Statement of Points to be Relied Upon by Century, filed 12-2-58.

238. Statement of Points to be Relied Upon by Virgil J. Pague, filed 12-3-58.

239. Designation of Record on Appeal by Century, filed 12-4-58.

242. Court Reporter's Transcript of Proceedings of 9-15-58, filed 12-15-58.

244. Designation of Record on Appeal by appellants Ester, Owens and Barnett, filed 12-17-58.

245. Statement of Points to be Relied Upon by Joint Appellants Ester, Owens and Barnett, filed 12-17-58.

248. Order Extending Time for Filing Record on Appeal to 90 days from date that Notice of Appeal of United States was filed, filed 12-19-58.

249. Statement of Points on Appeal of United States, filed 12-23-58.

250. Designation of United States of Record on Appeal, filed 12-23-58.

251. Certificate of Service by Mail of Government's Statement of Points on Appeal and Designation of Record on Appeal, filed 12-23-58.

252. Court Reporter's Transcript of Proceedings of July 10-11, 1958, filed 2-6-59.

253. Request of Appellants Barnett, Owens and Ester to Certify and Transmit Record and Proceedings for Preliminary Hearing in Appellate Court Under F.C.C.P. Rule 75(j), filed 2-9-59.

254. Supplemental Designation of Appellants Ester, Owen and Barnett, filed 2-9-59.

255. Amended Statement of Points to Be Relied Upon by Appellants Ester, Owens and Barnett, filed 2-9-59.

256. Certificate of Service by Mail, filed 2-9-59.

Printed Transcript of Record on USCA Cause No. 15219. (This record is on file in the U. S. Court of Appeals.)

159. Opinion and Mandate of the Appellate Court in its Cause No. 15219, filed 1-2-58.

Clerk's Journal entry of September 15, 1958.

Civil Docket entries in 1958 for July 11, 14, 22; August 22; Sept. 15, 29 and 30; Nov. 28.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellants for preparation of the record on appeal herein, to-wit:

Filing fee, Notice of Appeal, Century Inv. Co., \$5.00.

Filing fee, Notice of Appeal, Pague, \$5.00.

Filing fee, Notice of Appeal, Ester, Owens and Barnett, jointly, \$5.00.

Filing fee, notice of Appeal, United States, \$5.00. and that with the exception of the fee charged to the United States the above amounts have been paid to me by counsel for the respective parties.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 11th day of February, 1959.

[Seal]

JOHN A. BURNS,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

United States of America

Western District of Washington—ss.

I, Harold W. Anderson, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, Rule 75(o) FRCP, I am transmitting herewith supplemental to the record on appeal in this cause the following additional document in the file dealing with the action, to wit: Number 257, Court Reporter's transcript of Excerpts of Proceedings of August 22 and September 15, 1958, filed June 2, 1959.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 3rd day of June, 1959.

[Seal]

HAROLD W. ANDERSON,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 3804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, a
corporation; HARTFORD ACCIDENT & IN-
DEMNITY COMPANY, a corporation; A. E.
SHERMAN and JANE DOE SHERMAN, his
wife; VIRGIL J. PAGUE and JANE DOE
PAGUE, his wife; CARL W. PAGUE and
JANE DOE PAGUE, his wife; ARTHUR G.
BARNETT and JANE DOE BARNETT, his
wife; EDWARD R. ESTER and JANE DOE
ESTER, his wife; and DONALD P. OWENS
and JANE DOE OWENS, his wife,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that the matter of defendants'
motions for summary judgment in the above-
entitled and -numbered cause was heard before
the Honorable John C. Bowen, a Judge of the
above-entitled Court, beginning Thursday, July 10,
1958, at 2:00 o'clock p.m. [1]*

* * * * *

* Page numbers appearing at bottom of page of Reporter's
Transcript of Record.

The Court: I wish to say to Counsel now that this statement of the Court through Judge Hamley on the sixth page of the original opinion in the last paragraph near the bottom of the page, this statement, "Instead, the award was based upon the net rentals received by the appellants from their own buildings during the time the government had the right of possession of the land. An award on this basis, entirely disassociated from the principal compensatory damages, is not sustainable on the theory adopted by the trial court." Notwithstanding the fact the appellate court has found that it was so, that statement is not accurate. This Court never awarded any damages in this case or any relief in this case on [4] any such principle.

It may very well be that the amount of the judgment was possibly coequal or commensurate with those rentals, but rentals or the receiving of rentals was not the basis.

The basis was the failure to perform this contract to remove these houses from this property within the time specified and it was not on any other theory, and I think the Court had in mind and possibly indicated to Counsel in some words which I do not see in any record before me, and very likely was not before the appellate court or Judge Hamley, that the Court had considered the doctrine of trespass and implied contract, too, but certainly trespass, and had rejected any substantial right of recovery or had later decided in giving the rentals the consideration which the Court gave, and I think the Court made it plain to Counsel

that the Court did not regard the entity of Century of sufficient independence of the parties who formed it or of the persons who knew in fact of what the contract was and took their rights in the property subject to the contract and therefore were bound by the conditions of the contract, nor such corporate entity sufficiently clear to shield the other defendants from liability.

That is the reason the Court decided the case [5] as it did, and it did not intend to base the trial court's award, "upon the net rentals received by appellants," which the appellate court thought from the record before it the trial court intended to. You may proceed. [6]

* * * * *

The Court: That may be the reason why Judge Hamley made the finding I spoke of a while ago, that he was not informed by sufficient of the record before him as to what the real basis of the Court's decision was. You may proceed. [17]

* * * * *

The Court: I would like to add this to it, that since each and every one of the defendants dealt with this property with the contract obligations originally made by Century in mind, with full knowledge of it, that it was wholly inequitable and unconscionable for them to disregard the rights of the United States of America under the Century contract, of all of the terms of which they were well aware, and took the property interests they had purchased by succession at their peril. That was the theory on which the Court intended to

decide the other cases, and it is difficult for me to see how the appellate court escaped having that understanding of the true basis and how it got off and turned the decision wholly on the circumstances.

The Court, after the Special Master's report, thought that the obligation which was imposed upon each and all of the parties would not be reasonably compensated by a sum that would be comparable to the amount of rentals and profits that they had received and realized by reason of their equitable wrong, and it is apparent to me that the Court through Judge Hamley or otherwise did not get the true picture. It may have been true and the reason may very well be that they did not have all the record before them and I do not see why they could [29] have gotten the idea, but they got it, and they made the ruling notwithstanding lack of information or wrong information or whatever it was. They have made the ruling and their ruling stands in this court, good or bad, according to the notion of the Court. [30]

* * * * *

Mr. Barnett: Yes. The Circuit Court allowed the trial court to construe its own findings in the following language: "Upon remand, the trial court may determine the question of liability on the theory of trespass or implied contract to pay reasonable rental, [33] either by construing the findings in the record"—in other words, the Circuit Court leaves it to this Court to construe its own findings.

Now, I took the liberty of meeting with the court

reporter and having him go back over his records at the time this Court heard the motion to alter or amend its oral opinion, and at that time the Court will recall gave the United States two or three weeks to produce proof——

The Court: I think you ought to offer that for filing if you want to use it as a basis of your argument.

* * * * *

Mr. Barnett: For the record then, your Honor, this document which has just been filed is an excerpt of the proceedings before the Court on April 20 and 21, 1956. [34] I am directing the Court's attention to Page 3 thereof to paragraph numbered two. The Court was speaking and stated that, "The plaintiff has not sustained that burden in that, although the judgment on the declaration of taking"——

* * * * *

Mr. Barnett: Well, that Paragraph 2, your Honor, stated that, "The plaintiff has not sustained that burden, in that, although the judgment on the declaration of taking and awarding just compensation was valid, plaintiff has not proved that the future ascertainable installments (that is, of the future ascertainable [35] amounts equivalent to annual real estate taxes on the lands subject to the estate taken by the Government) of such just compensation have been paid; that the Court cannot find that such installments have been paid; that the Court does find that plaintiff is not entitled to

any relief, based upon the necessity of establishing such plaintiff's exclusive right of possession."

Now, your Honor, the emphasis I want to give at this moment is that a proper construing of the findings, which I felt were plain enough and for that reason made the petition for rehearing, the emphasis that I feel ought to be given is that the plaintiff is not entitled to any relief based upon the necessity of establishing such plaintiff's exclusive right to possession.

Now, the findings as written and presented——

The Court: May I interrupt you once more. I do not suppose the Court's attention at San Francisco, the Circuit Court's attention, was ever called to this language.

Mr. Barnett: No, your Honor, they did not have it, but now unfortunately in transcribing the findings from the statement of the Court to the findings of fact as presented and entered, it is not as clear as this statement. I wish when the findings had been made we had had this statement. I think possibly the Circuit [36] Court would have seen that "any relief" meant just what it says, that the Court had considered the question of the plaintiff's right to exclusive possession.

Now, therefore, if the Court can now construe its findings as stated at that time in the light of the Circuit Court opinion and put in the construction which the Circuit Court has provided for, namely, to determine whether or not we are liable, to determine if we are liable, the Circuit Court says, "Upon remand, the trial court may determine

the question of liability on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings in the record or by proceeding to another trial, as may be thought proper"—now, that's on Page 2 of the supplemental opinion, your Honor, Page 2.

The Court: In the last paragraph of the quoted language.

Mr. Barnett: It's the middle paragraph, your Honor. It starts out, "In our view, justice therefore requires".

The Court: I have that.

Mr. Barnett: "Upon remand, the trial court may determine the question of liability by construing its findings or proceeding to another trial."

The Court: I do not see that. [37]

Mr. Barnett: The paragraph starts, your Honor, "In our view, justice therefore requires".

The Court: I have that and I have "Upon remand" and I have everything except "by construing". "* * * on the theory of trespass or implied contract to pay reasonable rental, either by construing the findings"—I do see it now—"* * * either by construing the findings in the record or by proceeding to another trial, as may be thought proper." And then they admonish again, and I have to accept as the ruling of this case in respect to any further proceedings in this court or any other trial proceedings on the merits, I have to accept as the law of this case binding on this Court, no matter whether inadvertently imposed by the appellate court or very advisedly and fully and after full

and complete information, I have to consider as the law of the case that this Court shall not include any rental of the buildings.

Mr. Barnett: There is no established law binding on this Court in the language of this remand. It leaves it to the discretion of the trial court to construe its own findings.

What I am arguing for, your Honor, is that the findings are plain and that this excerpt indicates that the Court has ruled out any recovery to the plaintiff [38] based on its right of exclusive possession and that the only issue which the Circuit Court should have considered was the matter of the liability on the breach of contract.

Now it's back before this Court and I am arguing that the Court because of its knowledge of the facts, because of this excerpt, because of the findings, should and ought to construe the findings to dismiss the noncontracting parties.

Now, with reference to the contracting party, the Court has said there is no question of liability. It doesn't ask the Court to construe in the same way for the contracting party. The Court has advised the Court in that case to proceed to a trial to ascertain the damages against the contracting parties Century and the United States, is the language, and says, "It would appear that the measure of damages would be the same." I don't know whether that's binding or not. It might be that there is some other basis, but that's not my concern at this moment. I feel that, not being a contracting party, the defendants Barnett, Owens and Ester

should have been dismissed by the Circuit Court. We feel the findings were so clear that the record will show we even took this up in certiorari, but it was denied and not heard.

The Court: I would like to know what the attitude of your clients is, Mr. Barnett, regarding this [39] tender of the performance in the sum of five thousand odd dollars tendered in this court for the benefit of your clients, I assume, on the 8th day of July, 1958. Do you reject that tender or do you accept that tender?

Mr. Barnett: I have several thoughts on that, but I haven't had time to develop any law because it was just done within the last two days.

First of all, I feel the tender is invalid and insufficient because it is a deposit made not in conformity to any judgment of this Court. Every single judgment entered in this Court pertains to parcels by number, it pertains to an amount of money for rent and it says a sum equal to the equivalent of the amount of taxes. It does not allow a lump sum deposit of taxes for parcels 1 to 10 not segregated for any year.

Now, the proof tendered by the plaintiff in this case at the time of the trial in September of 1955 to show payment for each piece of land consisted of calling Millard Thomas, who produced his records which were broken down to show each parcel, each rental amount, but he had no taxes, but at least he showed the rent for each property.

This last minute lump sum payment is not identified, it isn't segregated. I couldn't tell this Court

right now whether it's 5,000 for 1955, 1954, 1953, [40] nor which piece. I don't know. We haven't had an accounting. It's a last minute Johnny come lately effort, to use this unfortunate language, to take advantage of the unfortunate language by the Circuit Court, which said that it may be that they could make a payment in the future.

Now, the second thing, your Honor, is this——

The Court: May I ask you before you start on the second argument, do you prefer not to say that your clients do or do not reject this tender? Have you some reason for taking that position, or if you do not have any reason for taking that position, what is the attitude of your clients, do they accept the tender or do they reject the tender?

Mr. Barnett: We have on file, your Honor, written rejections to any tenders of the money rentals. So far this is the first——

The Court: Do you want to reply to this tender?

Mr. Barnett: No.

The Court: What I want to know is——

Mr. Barnett: We reject this tender.

The Court: Pardon? Just repeat what you said, that is all I want you to do. Do you wish your rejection of tenders previously filed to apply to this one? [41]

Mr. Barnett: Yes, your Honor.

The Court: Then I——

Mr. McKinnon: May I ask, your Honor, the rejections of which Counsel speaks were rejections filed before the trial in this case?

Mr. Barnett: Well, as of this moment we now

reject any tender made and will file a document accordingly if it's required.

The Court: Do you make the last statement with reference to the tender which was made by the United States and referred to in Mr. McKinnon's affidavit, which tender is said in the affidavit to have been filed in this court in a case other than this one on the 8th day of July, 1958?

Mr. Barnett: We do so reject the tender, your Honor.

The Court: Very well. You have answered the Court's question and I do not need you to discuss that any more. Mr. Doolittle, may I hear from you? Have you some motions pending, or do you take advantage of some motions made by other litigants other than your client? [42]

* * * * *

Mr. McKinnon: * * * It would be easy to forget the actual facts here. The facts, as the Court well knows, are these: The United States, representing all the people of the United States, spent a vast sum of money building emergency war housing. It was not good housing, it was substandard, poor, emergency housing intended only for the duration of the emergency, the kind of housing that [56] is a blight on any neighborhood, even the industrial area in the Duwamish Bend where these homes are located.

Congress very wisely when it enacted the law permitting the condemnation of land for the erection of these shacks and when it appropriated the money for the erection of these substandard homes

decreed that at the end of the emergency these homes must be removed. There was no option given to the United States or its agents, except in some very special circumstances that didn't apply here those homes had to be either demolished or removed.

These defendants, with full, complete knowledge of the facts relating to the Lanham Act housing, the obligation of the government to have these homes destroyed, the obligation of the purchaser Century Indemnity Company to remove these homes and restore the vacant land to its prior condition, went ahead and used these homes for housing, these substandard homes. They used the land of the United States to rest these homes on. They trespassed there for two and a half years, and now they say that justice—they each used the word “justice” and emphasized it—that justice requires this Court to ignore the rulings of the Court of Appeals and close this case out leaving nothing further to be done.

I assume that they do believe, although they [57] said that nothing further should be done, that the United States in Case 1143 should pay them and pay them well, and that in fact in Case 1143 the United States should pay them the taxes assessed by the City for the presence of these buildings on that land which was in the exclusive possession of the United States. That remains to be done.

Obviously that isn't justice. Justice here is adequate compensation to the people of the United States from these unrepentant sinners who come before this Court with a technical claim that be-

cause the United States hadn't paid the rent they shouldn't be entitled to collect for even the use of their land, much less for the great damages they sustained from the presence of these shacks where Congress decreed they should be removed.

Now, what is the fact with relation to the payment of taxes? Not the claim of Counsel, but the fact. These parcels in condemnation case 1143 each had a judgment entered requiring the payment of reasonable rental and the payment of taxes. What is that judgment, and I'm referring to a typical one, it happens to be Parcel No. 5, of Jens K. Petersen, what does that provide about taxes? Does it say the United States must tender the amount into court, must determine what the taxes are, [58] or does it put some other condition on it? I would like to read.

"During the period of occupancy of said property by the United States or its assigns, the United States agrees to reimburse said respondents or their heirs or assigns for any increase in the general taxes imposed upon the premises and paid by the lessor which increase is based solely upon the value of any improvements placed thereon by the United States. Provided, however, that at least thirty days before paying such increased taxes the respondent shall submit to the Federal Public Housing Authority a copy of the tax bill in order that"—and it goes on to show the purpose of it.

These defendants have not yet submitted those tax bills. The taxes are not yet payable by the United States. It may be they will never be pay-

able. But we had possession, we paid the rental, paid it in advance, although there was an anticipatory breach by the defendants who refused to accept the payments.

Despite their filed refusal to accept the payments we tendered in such amount as we knew about, the amount fixed by the Court for rentals, and in the case of the very few owners, not these defendants, in the case of a very few owners who did give us their tax [59] bills, they were promptly paid.

Now, can it be said that under those circumstances we did not have exclusive possession? Just on the record in this case without regard to the general condemnation law, we had no obligation to pay the taxes until we got the tax bills. We never got the tax bills. How could we pay them? And do these defendants in any seriousness contend that after they began to trespass on our land we should pay that part of the tax bills, the most substantial part of it, that referred to the improvements rather than to the bare land?

What we wanted, what the United States wanted by its notices of renewals, was bare land. It did everything it possibly could to get bare land, to live up to the intent of the congressional act that required that this substandard housing be removed, that the shacks be taken off of the landscape and the land restored to its original condition.

In any event, we have under well established condemnation law full possession of all of the land as soon as we get possession from the Court. Here we had judgments that required us to pay it. The

payment was not and is not a condition of our legal possession, because Congress by passing the Tucker Act a great many years ago agreed in advance to pay reasonable compensation, [60] and these defendants under the Tucker Act could have come in to this Court at any time and sued the United States for the amount of the taxes, if the United States was wrongfully withholding that amount. As I pointed out, we weren't withholding it. We didn't even know what the amount of the taxes was.

I might say as something of an aside, there's no one in the United States that yet knows what the taxes are. Probably the amount we have deposited is several times too large, but every possible contingency was included so that there could be no further technical claim that we hadn't paid it. There will have to be a proof by these defendants before they can withdraw any of that amount.

I would like to refer the Court to a relatively recent decision of the Supreme Court in this respect, not quite as old as the ones that have been cited, and I think much more appropriate. It is *Hurley against Kincaid*, 285 U. S. Page 95, where the Court held that payment of compensation was not a prerequisite to possession by the United States because the owner whose land was taken had a right under the Tucker Act to collect the money without regard to any condemnation award. There is a case in the United States Supreme [61] Court, an older case, which refers to the laws of the State of Washington, *Hayes against the City*

of Seattle, 251 U. S. 233, where Judge Neterer in this court held that there was no necessity under a special Act in the State of Washington for the payment of compensation before the taking of property because at that time and in connection with that kind of taking there was a provision in Remington's Revised Code permitting the person whose property was taken to sue the United States, something similar to the Tucker Act but on a local level, and the Supreme Court affirmed Judge Neterer's decision in every respect.

I can if the Court wishes cite a great many other cases on that general proposition. There is United States against General Motors Corporation, 323 U. S. 373.

I submit that it is clearly established that there is no necessity that the United States pay compensation before it have possession of condemned property. It is the best procedure. We try to do it when we can, but certainly we couldn't force these defendants to give us tax bills so we would know the amount to tender into court. [62]

* * * * *

The Court: There is nothing, in my opinion, in the language of the appellate court in this case which validates this tender of payment of these renewal considerations or makes the right of belated tender at this late date any greater than it was before that Court used this language. Surely two years is too long to wait to make a valid tender of this kind, in view of the fact that during all of that two year delay by the government

in making this tender these parties were in open dispute about this matter, and in view of the further fact that in the course of the former trial of this case the nonpayment by the government of its easement term-extending dues was the subject of extensive consideration by [64] Counsel on both sides of the litigation and by the Court.

This tender, if in correct amount as of the 8th day of July, 1958, when it was finally made, could have been ascertained as to correct amount and could just as well have been made at a time earlier in the approximate two year period of the government's delay following the termination of the effective term of the easement which the government had and which is the subject of the renewal desired as a result of this belated tender made in this case or in the related case in this court on the 8th day of July, 1958.

Therefore, the Court rules that the tender was too long delayed and is not a valid tender and has no effect so far as concerns effective renewal of the easement of the government which is involved in this case. [65]

* * * * *

The Court does now further consider the matter in the light of the matter already noted. The Court had no way of knowing until the 8th day of July, 1958, that the government ever wanted to make any tender or ever wanted to extend these leases so far as the proof in the record in this case is concerned. [66]

* * * * *

Mr. McKinnon: However, the Court has indicated that this Court if it wishes can have a new trial at which we could prove the facts in relation to the judgments of condemnation in 1143 which required that there be a tender of the tax bills before the taxes are paid.

Now, these defendants talk of a condition subsequent. You don't have a condition subsequent come into effect when there is a condition precedent that hasn't been complied with, and I submit that that's clearly the case here.

The Court: What condition precedent has been complied with now?

Mr. McKinnon: It has not been complied with. They have not submitted the tax bills. Your Honor has ruled——

The Court: I have ruled, and that will be the law of this future trial, that that comes too late and cannot have any effect on the government's rights in this case.

Mr. McKinnon: That's the payment, if your Honor please. I'm not now talking of the payment. [71] I'm assuming, your Honor, for the moment that the Court has correctly decided that the tender on July 8th is ineffective, it has no effect on the further proceedings in this cause. I say, assuming that, we nevertheless can at a new trial establish possession because we can and will prove from the records in Cause 1143 that the government had no obligation accrued to pay those taxes because there was a condition precedent, an obliga-

tion on these defendants, which has not been complied with.

The Court: The Court has already decided that once. Is it your contention that the government has a right to try that issue again?

Mr. McKinnon: In view of the action of the Court of Appeals in permitting us to go back for a new trial I say yes, your Honor.

The Court: It seems to me that the record was not before the Court of Appeals on that point.

Mr. McKinnon: That is correct, your Honor.

The Court: Unless there is some evidence different and very vital that is different from what has already been introduced, I do not see what you have——

Mr. McKinnon: We have a case in this posture, your Honor: We have no judgment at this time. Your Honor is invested with authority to determine if the government should have a new trial at which it could introduce any evidence it wished, [72] ignoring that which may have been introduced in the previous trial and starting on a new theory, or where perhaps some part or all of the record would be treated as part of the record in the new cause. [73]

* * * * *

The Court: I want to say this, Mr. McKinnon, at this time: I wish you to have in mind that the Court has already decided in this case, even if it was not brought before the Circuit Court with sufficient emphasis to impress upon the Court that it had done so, that there was not any right of

possession in the [74] United States, that the government failed to establish that fact which it had a burden to establish, and therefore that there cannot be any right that its claim of possession be not trespassed against, and also the Court does not see anything in the evidence before the Court at the last trial, and that will give you some idea as to whether you want to supply additional evidence, of any damages to the United States by reason of keeping the United States away from the possession of the land.

Mr. McKinnon: Your Honor,——

The Court: You are going to have to prove not only a wrongful deprivation of possession which the Court found on the record previously had not been done, but further than that you are going to have to prove that the United States was damaged in some way or other than losing what the appellate court had insisted upon interpreting as an allowance of anything on account of rentals collected by these tenants and purchasers of these buildings.

Mr. McKinnon: The appellate court, of course, has not said that the Court may not consider that in fixing the damages.

The Court: It seems to me they have, because the only way the Court considered it is in the manner I have said I did irrespective of what the [75] appellate court found, and I cannot change that in any way because that is the fact, and although their saying that the Court did it, although the Court knows that it did not, will have to continue

as the rule in this case, at a new trial as well as at the old one. So you are going to have to furnish some different evidence than was furnished before of two names: First, the right not to be trespassed against so far as the United States is concerned, and some harm that resulted from it other than the loss of any of these rentals or the determination of any damage based upon any consideration of evidence relating to rentals collected by these purchasers.

Mr. McKinnon: I submit, your Honor, that we can do that at a new trial. We can, one, show the proceedings in 1143 on the question of whether we had rights in the property, and then as to damages we are prepared to introduce evidence, one, and I submit that all of these things are proper elements of damage in a trespass case, one, general damages based upon the fact that we did not get something that public policy required and that was a removal of substandard housing that we were willing to pay and did pay over \$100,000 to get, we paid \$100,000 to get that removal and we didn't get it. We then can prove, and this again is an element of damages in a trespass case, the reasonable rental value [76] of the land. Further, we can prove that——

The Court: I will not receive any evidence about how much rent these people got from this land.

Mr. McKinnon: No, the reasonable rental value of the bare land, your Honor, without regard to anything that the defendants may have received. In other words, bare land has a rental value and

we can introduce evidence of what that was.

The Court: The reason I made that comment [77] was because of the ruling of the appellate court.

* * * * *

The Court: The Court will not deprive the United States of the opportunity to put on this additional evidence, but I just wish everybody to understand that, because the appellate court took the view that this Court erroneously used the information it had on the record about that rental received by these house owners, such record information will not be considered for any purpose, not only will not again be considered for the purpose for which this Court did receive it, but this Court will not receive or consider it for any purpose at all. So you need not offer any evidence of a dollar being received by these house owners for the rental of any part of any one of those houses. The Court is determined to carry into effect literally the appellate court's ruling about that, even though what that Court said about this Court's use of that record information is all wrong. I respect it and honor it as a Court of superior authority over this Court's actions.

So, in order to make absolutely certain that [78] this Court does not fail to apply that Court's ruling on that subject, this Court will not receive any evidence or consider any evidence that has heretofore been received on that subject of how much rent these house owners got for rental of the houses or any part of them. You will have the right to offer any admissible evidence on the subject of the

right of the United States to receive damages for trespass and for implied contract, which is different from or in addition to that which is already in the record. Counsel can remind the Court of what is already in the record in the way of evidence. And also Counsel may offer any additional evidence that the government may have to offer regarding the nature and scope of its damages by reason of the breach of any right it had either on an implied contract or by reason of any trespass.

This Court at the previous trial has already, as I emphasize to you, found that there was not any trespass here. In effect the Court has so concluded and must necessarily have concluded upon the findings of fact announced by the Court that there is not involved here any trespass of any right the government had. Notwithstanding that fact I take it that that has been set aside by the appellate court's ruling, and the Court will hear additional evidence although not in repetition of the [79] same evidence on that subject.

Each and all of these motions for summary judgment are denied. The new trial will go forward on the date already set. [80]

* * * * *

Mr. Barnett: Your Honor, I listened very carefully to Mr. McKinnon and the same thing happened during Mr. McKinnon's argument that happened in the first trial, the comingling of the causes of action resting upon exclusive possession and the commingling of that with the liability under the contract.

Now, the Circuit Court has said there was clear liability on Century, and all his argument about general damage and everything else was prefaced by his statement first as to Century. I listened carefully to see where he was going to bring in the noncontracting parties. It was so comingled, he so comingled it that it was difficult to follow.

Now I will just refer to the Court's statement on the 21st of April: "The Court finds that the plaintiff is not entitled to any relief based upon the necessity of establishing such plaintiff's exclusive right of possession," and the Circuit Court's statement that the trial court may construe its own findings. If the Court construes its own findings in the terms of that language, the motion for summary judgment on the part of the people that the Circuit Court said could be dismissed, the Circuit Court said there would be no liability, this would not be true if, as Barnett, Owens and Ester contend, that leaves them then with an action [84] on a contract and bringing in all his damages.

The Court: There is another theory that the appellate court enforced upon this one, and that is the implied contract. The Court thinks that was all included in what the Court did in this case, but the appellate court did not think so. So there is an implied contract obligation which they say is permissible here.

Mr. Barnett: I'm sorry, your Honor, the Circuit Court didn't say that. Here is the language of the Circuit Court——

The Court: You disagree with this Court that

the Circuit Court said as I have tentatively observed, is that what you indicate?

Mr. Barnett: No, on Page 7, your Honor, here is the language. The Court says, "It is nevertheless true that the complaint is broad enough to sanction damages on the theory of trespass or an implied contract to pay the reasonable rental value——". Now, here is the language of the amended opinion: "But this would not be true if the government did not have the exclusive right of possession of the land——". Now the Court's statement in the excerpt of the 21st is, "The plaintiff is not entitled to any relief." There's implied contract disposed of, trespass disposed of, by those two statements. That's why Barnett, Owens and Ester petitioned [85] for a rehearing, and the Circuit Court solved the problem by saying that they would strike Paragraph 7 and substitute this paragraph saying this would not be true. What would not be true? That we would be liable on implied contract for reasonable rental for use of the land or trespass. That is not true.

Now I submit, your Honor, the motions for summary judgment on the part of Barnett, Owens and Ester, and, by implication, Pague, should be granted and this case left where it should have been in the first place, as an action on the contract without comingling all the other questions involved. [86]

* * * * *

The Court: The Court wishes to change what has been orally stated here by the Court a few minutes ago.

As to all defendants in this case except the defendant Century Investment Company the Court does grant the motion for summary judgment in favor of defendants because the Court has already construed its [87] findings and in pursuance of the Appellate Court's permission does now again construe them to mean, as the Court intended at the previous trial to rule, that the Government never did have any right of possession and therefore had no right to an action based on any theory of wrongful interference with that possession such as an action for trespass, and further because the Appellate Court in reversing this Court said in effect, among other things, that, not only as to the trespass basis of action but also as to a suggested possible implied contract basis of action, plaintiff United States would have no such right against these individual natural defendants if the Court found, which this Court did and does, that the Government had no right to exclusive possession, and further because the Appellate Court held that there was no contract obligation on the part of any defendant in this case except the defendant corporation Century Investment Company.

Mr. McKinnon: Your Honor, may I request that your Honor defer that ruling pending a motion by the United States to amend its complaint to charge the defendants with inducing the breach of contract by Century, which apparently would be permitted under the decision of the Court of Appeals and may effect substantial justice. Here the Court has already held that [88] these defendants

acted wrongfully and by this action the Court is excusing these defendants from any responsibility for their wrongful acts.

The Court: I am excusing them by what I think is the erroneous decision of the Circuit Court of Appeals.

Mr. McKinnon: The Circuit Court I submit, your Honor,——

The Court: This Court at the previous trial allowed recovery against all of these parties upon what appeared to me to be a correct theory of the law and the theory suggested by the evidence in the case, as explained in that trial record and in the record made herein subsequent to receipt of the Appellate Court mandate, but the Appellate Court has, as it has the right to do and, if it thinks the record justifies, has the duty to do, differed with this Court in what has been done, has reversed this Court, and has directed a new trial with specified directions. By that action, as I understand it, the Appellate Court has destroyed the only grounds that I know of on the facts disclosed by the evidence in this case and on the findings already made on the evidence for any recovery against these individual defendants.

Mr. McKinnon: Your Honor was given power to [89] grant a new trial.

The Court: It says, "Upon remand," I am reading the last paragraph of the quoted part of the supplemental opinion on the petition for rehearing, "Upon remand, the trial court may determine the question of liability on the theory of trespass or

implied contract to pay reasonable rental—" —that tells me how we should try this case— "—either by construing the findings in the record or by proceeding to another trial, as may be thought proper." But it tells me this implied contract and trespass theory is the limitation on such further trial, it seems to me.

Mr. McKinnon: That refers, your Honor,—

The Court: "If recovery is warranted on either of these theories, it should not include any rental value of the buildings, but may otherwise include any actual expense incurred or monetary damages sustained by the government."

Mr. McKinnon: However, the Court also gave you in the very part that your Honor has been reading the right to set this case down for a new trial. I submit that this Court in construing well established law should grant us that right to a new trial if it may enable us to collect damages from people who, similar to the defendants in the Washington Supreme Court case [90] that I referred to, have caused substantial damage. We should be freely permitted to amend our complaint so that our right to damages is not defeated on a technicality.

The Court: The Court is going—

Mr. McKinnon: And further I submit, your Honor, that as to the defendant Pague, the part your Honor has been reading does not apply. The appellate court inferred that we could on the new trial even establish that Mr. Pague is the alter ego of Century and would be liable on contract.

I am a realist. I do not expect that a man who is adequately represented by Counsel and by accountants is going to have a corporation which legally is his alter ego without regard to what the factual situation may be. However, no corporation acts in a vacuum. People cause corporations to act, and presumably anything that Mr. Pague's corporation, Century, did was done at the instigation, the direction, of Mr. Pague, and certainly under this decision of the Court of Appeals if we can establish at a retrial that Mr. Pague induced the breach of contract by his Century corporation, we can recover or should be able to recover if the Court grants us a new trial on the theory of breach of contract or inducing a breach of contract by [91] Mr. Pague. Century, of course, is insolvent, we will collect nothing from it.

The Court: I will hear Counsel's statement regarding Mr. Pague as to whether or not the conditions of retrial are not the same as they are with respect to the others.

Mr. Iversen: If the Court please, they are exactly the same, and here is what the Court said: "From what has just been said, it is plain that Pague is not liable on the theory of breach of contract. It would appear, however, that Pague is in about the same position as Barnett, Owens, and Ester, with respect to possible liability on the theory of trespass or implied contract to pay reasonable rental." So the Court put him in exactly the same position.

The Court: The Court now finally puts into

effect the last orally announced decision on these motions. There will be a retrial as to the defendant Century Investment Corporation purely on the breach of contract theory and as to the damages sustained.

There is nothing left to try, in view of what the Court has said, as to the individual defendants Barnett, Owens, Ester and Pague. As to them, summary judgment of dismissal is granted and it is most reluctantly entered, but the Court does so as a [92] consequence of this Court's obedience to the orders of the Appellate Court in connection with their reversal of this Court's former findings, conclusions and judgment.

Mr. McKinnon: May I have an exception to all of the Court's rulings?

The Court: Allowed. [93]

* * * * *

Mr. McKinnon: May I respectfully take exceptions to so much of the Court's last ruling as indicated there was still an issue as to whether there was a breach of contract by Century?

Mr. Iversen: We are not going to contend there wasn't a breach of contract.

The Court: Very well. [94]

* * * * *

This Court thought in substance and effect yesterday and thinks now that the reason the motions for summary judgment should have been and were granted and why this order therefor should now be entered is that this Court did in fact consider all of the evidence and [101] circumstances

evidenced by the record already before the Court, and this Court did intend to, and thought it did, decide at the previous trial that the Government had not established and could not establish any right to possession at any time material to this action and that there could not, therefore, be any basis for an action for trespass, and yesterday and today this Court also thought that it had at the former trial considered the evidence in the light of and insofar as it had a bearing on any other obligation, no matter by what name you call it, which the facts and the circumstances shown by the record imposed upon these individual defendants to respond to the plaintiff on any other cause of action or theory, but this Court at the previous trial was unable from evidence in the record to find any other theory of recovery.

And further in substance and effect this Court thought yesterday and now thinks the motion for summary judgment to the extent granted by this Court orally yesterday was called for because the Appellate Court has directed this Court not to consider in connection with any new trial or re-trial of this case any evidence received previously concerning the rental income which the defendants have received on account of this property. That would seem to me to cover not only the present issues [102] before the Court, but any other that might be named in any additional pleading, because during the times in question it then appeared that plaintiff was in default and would so continue as to conditions precedent and indispensable to

plaintiff's being entitled to collect rental income.

Notwithstanding the Court's emphasis already laid upon the Court's continued belief that the Appellate Court was wrong in making the finding as to what the Court did respecting that evidence about rentals received by the individual defendants who as house purchasers received the rentals, the Court said in that connection, and it is true in connection with every other related situation referred to yesterday, that, in effect, no matter whether this Court thinks the Appellate Court was wrong or not, this Court stands ready at all times to do its best to apply to any future or any subsequent action of this Court the directions and [103] rulings of the Appellate Court which are pertinent.

* * * * *

The Court, as I say to you, already has considered this evidence before this Court for any and all purposes, and I think Counsel are not unfamiliar with the principle in this state generally applicable in the [106] state courts as well as in this court that if the evidence entitles recovery on any theory, the trial court is justified in adopting the theory whether it is expressly in the pleadings or not.

I cannot emphasize any more strongly than I have that this case was a very troubling one from the trial standpoint, and the Court, you may rest assured, in order to make its work more complete, if possible, if it could possibly have thought that there was any other issue not tendered in the pleadings especially on which a more correct ruling

could have been made or on which the Court's action could have been based, would have applied and adopted such theory whether Counsel suggested it or not. We have taken a great deal of trouble with this case. It has been one of the most troubling ones I have ever had. Although some people might not think it ought to be, it has been. [107]

* * * * *

The Court: I have no objection to that. If it is wrong, the Court reviewing it can disregard the inappropriate words. It is not positive error, it seems to me, to say "adjudged" when all you do is order. It cannot mean any more than it can possibly mean under the law mean, and if under the law it possibly can be a judgment in order to effectuate the Court's intention, then it may be. What the Court intended as far as these defendants are concerned is certainly a final judgment. It has only one condition which does not apply to the [109] issues ruled upon. It is a specific reservation of the right to determine all the original parties or all the parties before the Court when the Special Master did the work which resulted in his making his final report to see if there is any ruling in that connection that should be made in the future affecting these dismissed defendants. One reason for reserving that condition is because the Special Master was not represented by Counsel at yesterday's hearing, and I feel it is only appropriate and necessary that the Special Master be present and be heard, to give him a right to be heard through Counsel. So it is more with refer-

ence to saving the status as to that Special Master's right for a time when we may all be present and be considering that subject properly. However, I think that issue has nothing to do with these important ones here. That is merely an incidental relating to costs and expenses of the action. Mr. Doolittle? [110]

* * * * *

The Court: All are present. As a part of what the Court has already said the Court wishes to attempt to let the record show a more explicit reference to the circumstance that certainly has a very important bearing upon the granting of these motions for summary judgment.

The Court in that connection wishes to emphasize that this Court has, in pursuance of the express permission expressly stated by the Appellate Court in its supplementary opinion dated December 23, 1957, in this case, and does now, in pursuance of such express permission, determine this question presented on these motions and the question of liability by [111] construing and supplementing the findings already made at the former trial and now and since then of record in this case and without further trial as to additional evidence for the reasons already stated among others, and one very substantial reason particularly is the exhaustive, lengthy trial and great amount of time and effort in the trial already had in this case, and because the Court cannot conceive that any material fact or circumstance relating to this transaction that could influence this Court's decision has

been left out of the record already made. [112]

* * * * *

The Court: Let this order granting summary judgment, approved in form by all Counsel of all parties of record except the Special Master, be now entered. [113]

* * * * *

[Endorsed]: Filed February 6, 1959.

[Title of District Court and Cause.]

EXCERPTS OF PROCEEDINGS OF
AUGUST 22, 1958

* * * * *

Mr. Doolittle: If the Court please, speaking on behalf of the attorneys for all defendants, I am authorized to state as follows:

It is our understanding that the Court is overruling the objection of all defendants to the reception of any evidence. We object to that and preserve our exception to that. To expedite the matter we are willing that the previous record as to the Master's report and the value of his services may be considered by the Court in lieu of new testimony to be taken at this time which would only be repetitious, providing it is understood that such previous record is, of course, received over our objection.

Now, does that——

Mr. Westberg: Your Honor, Mr. Griffiths is willing to submit the question of determination of his fee and the allowance of expenses which he has

incurred upon all the evidence that was heard by the Court relating to the determination of the fee and expenses prior to the entry of the original order.

The Court: The Court will determine the matter upon the record already made, then, in view of what has been said.

* * * * *

[Endorsed]: Filed June 2, 1959.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that further proceedings in the above-entitled and -numbered cause before the Honorable John C. Bowen, a Judge of the above-entitled Court, on Monday, September 15, 1958.

The plaintiff was represented by Mr. Joseph C. McKinnon, Assistant United States Attorney.

The defendant Century Investment Corporation was represented by Mr. Lyle L. Iversen, of Messrs. Lycette, Diamond & Sylvester, Attorneys at Law.

Whereupon, the following proceedings were had and done, to-wit: [1]

The Court: All are present. You may proceed.

Mr. McKinnon: Your Honor, I believe Counsel will stipulate that I may be deemed at this time to have made a proffer of proof of the matters covered by the affidavit in support of plaintiff's motion for reconsideration and rehearing of the summary judgment.

The Court: State what they are. I want to know

what they are. Can you give the substance and effect of it?

Mr. McKinnon: Yes, your Honor. They would be that the United States duly served notice of renewal from year to year. You don't wish me at this time to mention witnesses or testimony, just the conclusions?

The Court: No.

Mr. McKinnon: That many of the judgments fixing just compensation for the use of the several parcels of land referred to in the sketch annexed to the moving affidavit provided that in addition to a stipulated amount of rental to be paid by the United States of America, that government would reimburse the owners in amounts equal to the real estate taxes validly assessed; that much of the land upon which the individual defendants in this action had their buildings, Buildings 101 through 105, had no taxes due during any part of the period of occupancy, and that other parcels of land [2] underlying those buildings had the taxes paid by the government before the trial of this action, the first trial of this action; that the reason some of that property had no taxes due is that it was land first owned by King County, Washington, and therefore tax free, and later transferred by King County to the City of Seattle and as land owned by the County and later by the City it is not subject to real estate taxes, therefore such land never had any taxes due during any part of the period when the government claimed the right of posses-

sion of the land underlying these buildings; that such land included——

The Court: When you finish with that phase of your proof, about this non-tax payment or non-payment of a sum equal to taxes or similar to the amount of taxes, I want to make a response. Proceed.

Mr. McKinnon: That the land not subject to taxation of any kind included Lot 11, half of Lot 12, Lot 30 and Lot 34 and the south 35 feet of Lot No. 10, those figures being the lot numbers shown on the sketch annexed to the affidavit; and that as to each of those lots the government made a timely tender into the registry of this court of the full amount of the rental fixed by the Court and there was nothing further which could or should have been paid by the United States for [3] the exclusive possession of such land.

That would be the sum and substance of the proof which we would expect to adduce as to the municipally owned land.

The Court: As to this part of it have you any——

Mr. Iversen: I object, your Honor, on the ground that these matters have all been concluded by the judgment previously entered and these matters were all gone into at full length and were settled by the pleadings previously.

The Court: That objection is sustained for the reasons stated and for the further reason that the Court heard from Counsel or from evidentiary sources during the prior proceedings in this case before judgment was entered from which the ap-

peal was taken that the United States had not paid these amounts that are in question in lieu of taxes, and much of them, a substantial amount were in arrears, and that the government never did have any intention of paying them. That was the attitude of the government respecting them and the record of the government respecting them which was brought out for the attention of the Court during the prior proceedings prior to the judgment.

Mr. McKinnon: The record, of course, will speak for itself, your Honor. [4]

The Court: That is the recollection of what took place, and the Court wishes to note that recollection now. I have seen reference to that circumstance somewhere in this record today, I am not just sure where.

Mr. McKinnon: We would further expect to prove, and if necessary I could make a formal proffer of proof, that Building 102 had been rented by the defendant Virgil J. Pague at a profit, although it is partly upon Lot 34 which is one of the City-owned lots; Building 103 likewise owned by him is physically present on City-owned Lots 10, 11, 12 and 30; that defendant Pague continues to have those buildings upon those lots and has neither a permit from the City nor is he paying rent to the City for the use of those lots and did not have such permit or pay such rental during any part of the years 1953, 1954, 1955 and 1956; that during those years and for the land taxable periods within those years the government has in fact paid some rentals

on some of the privately owned land including some of the land which is presently owned by some of the individual defendants.

In other cases, without being able to show affirmatively that the government made a specific payment in dollars, I expect to prove and offer to prove that the United States received from the then owners of the land receipts in full covering everything due for the [5] rental of the land for periods of time when the government claims possession or the right to possession of the land, but the defendants have contended the government did not have such right of possession because it had not paid all rentals.

The Court: Be sure to confine your offer of proof to that kind of proof which is probative of the issue here, namely, the amount of damages to be awarded against the defendant.

Mr. McKinnon: My instructions from the Department of Justice, your Honor, were to make this proffer in this court and that it should in the view of the Department of Justice apply to all the defendants because there has never been a final judgment dismissing them, so that all defendants in the view of the Department of Justice are still at least technically before the Court.

The Court: That is contrary to my understanding. My understanding is that the defendants, all except this defendant Century, have been formally dismissed by an order entered within the last four or five weeks.

Mr. McKinnon: My feeling as Counsel was that

the Court would have that belief. That was the reason I suggested entering the stipulation in the record rather than making the formal and lengthy proffer of proof.

The Court: It was that order to which the [6] Court added the words "at the", if you remember, today.

Mr. McKinnon: Yes, your Honor, that would be the order of July 11th.

The Court: That was the order dismissing the defendants.

Mr. McKinnon: That's right.

The Court: And I do not now understand as Counsel speaking does that they are any longer in the case, the defendants other than Century, except for the purpose of the Court's authority and duty to award compensation and relief to the Special Master.

Mr. McKinnon: Do I understand then that the Court refuses the proffer of proof?

The Court: I do not do so. I am telling you what my intention is about a future order.

Mr. McKinnon: If I may then go on with the substance of the material which would be covered by such a proffer of proof——

The Court: I do not wish to spend much more time on this. How much more time is it going to take?

Mr. McKinnon: Perhaps, in view of what the Court said, the Court could agree that a proffer of proof of the matters covered in the affidavit in

support of the motion for reargument has been made, considered by the Court and denied. [7]

The Court: Is there any objection to that?

Mr. Iversen: I have no objection to your Honor denying it.

The Court: The Court does deny it. It has been considered previously and, if presented to the Court now, it would not change this Court's action in this case at all. The Court is concerned with live witnesses and other record evidence that we have in the record already concerning the damages which may properly be allowed to plaintiff against this defendant now before the Court.

Mr. McKinnon: Then to proceed with the trial as against Century alone on the sole issue of damages, your Honor, I ask that the record show, if Counsel agrees, a stipulation of the parties that the Court may consider all evidence adduced at the first trial subject to such objections as were made when the evidence was offered at that trial. Have I correctly stated our understanding, Mr. Iversen?

Mr. Iversen: No, what I said was that I believed your Honor would do that anyway. It is my understanding that your Honor will consider everything that has gone before as being in the record now.

The Court: I certainly will. It is still in the record, is it not? [8]

Mr. McKinnon: Yes, your Honor.

The Court: You may rest assured that the Court will.

Mr. McKinnon: I call Mr. Raymon.

The Court: You may do that.

EDGAR F. RAYMON

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKinnon): Would you please give us your full name and address, sir?

A. Edgar F. Raymon, San Francisco, California.

Q. And what is your present employment, sir?

A. I'm chief of the Land Section of the San Francisco Region for the Public Housing Administration.

The Court: Mr. Clerk, will you write down the name and let me have it, please, if you got it?

The Clerk: I thought he said "Raymond".

The Witness: R-a-y-m-o-n, no "d".

The Court: You may proceed.

Q. (By Mr. McKinnon): Mr. Raymon, are you now or have you ever been employed as an appraiser?

A. I have been and I am now, yes, sir.

Q. What if any experience have you had as an appraiser? [9]

A. Well, I first started in appraising on November the 19th, 1916, and I have been employed as an appraiser practically continuously ever since.

Q. Could you give us the names of some of your employers during that period of time?

A. Well, I started in with the Big Four Railroad at Cincinnati, Ohio, in November, 1916, appraising railroad land, the approach to which was by appraising land adjoining or adjacent similar

(Testimony of Edgar F. Raymon.)

to the railroad which had the railroad been moved would have been on that similar land. I went from there to the Lake Erie & Western Railroad doing similar work over their system, and from the Lake Erie & Western to the Toledo Ohio Central, to the Cincinnati Northern, to the Kanorwin West Virginia and the Kanorwin Michigan Railroad. I then went to the Michigan Central in Detroit and worked for them about a year and a half as an appraiser and then became chief of the real estate department for about another year and a half.

Q. About what year was that, sir?

A. About 1923.

Q. And would you continue, please, briefly?

A. I then went with the Chesapeake & Ohio Railroad at Richmond working over their lines.

Q. As an appraiser? [10]

A. As an appraiser. I then went to the Interstate Commerce Commission Bureau of Valuation at Washington and worked in a similar capacity over practically the entire country appraising railroad lands. I went from there to the—let's see, I went from there to the Resettlement Administration.

The Court: Are you satisfied of his expert qualification or do you think there is a lack of showing of experience here locally?

Mr. Iversen: I don't know what they are qualifying him for.

Mr. McKinnon: Appraisal, more particularly the buildings and property involved in this proceeding.

(Testimony of Edgar F. Raymon.)

Mr. Iversen: Well, I haven't heard anything yet that would qualify him for that.

The Court: Will you not pass to that subject now, something that tends to qualify him with respect to that, with respect to local values?

Mr. McKinnon: I submit, your Honor, his qualifications depend upon all of his experience rather than on some part of it, although I can bring out one factor.

Q. (By Mr. McKinnon): Have you ever had anything to do with lands work in the City of Seattle before this time?

A. I have. I was in charge of the Land Section of the [11] Public Housing Administration here in the Lyon Building for the year '50 and until July 1st of '51.

Q. Was the Public Housing Administration the agency of the United States that operated and owned buildings such as the buildings involved in this suit?

A. Yes, sir, and at that time I was given all the files on all of the so-called war housing in the Seattle region.

Q. Is this a fair statement or is it not, sir, that since 1916——

Mr. Iversen: I'm going to object to the leading nature of the question.

Mr. McKinnon: All right, I'll withdraw the question. It is leading. I thought it would save time.

(Testimony of Edgar F. Raymon.)

Q. (By Mr. McKinnon): Would you continue with your recitation, please, of your experience?

A. Well, with the Resettlement Administration we—I had charge of the buying and running titles and so on and appraising of the—at that time known as the Tugwell towns, one just outside of Milwaukee, one just outside of Cincinnati and one just outside of Washington, D. C.

The Court: The Court directs that no more questions or answers be made concerning experience elsewhere than King County or Seattle, Washington. You may proceed.

A. Well, since—— [12]

The Court: Just ask him another question.

Q. (By Mr. McKinnon): What experience have you had with the value of land and buildings such as Buildings 102, 103, 104 and 105 in this proceeding, which are buildings located in the Duwamish Bend area of the City of Seattle?

A. Do you mean just in King County?

Mr. McKinnon: Your Honor, may he talk about——

The Court: Answer the question first and then let Counsel ask any others.

A. Yes, I have done probably six or seven years work in various parts of the West Coast, the States of Washington, Oregon and California.

The Court: I would like to remind Counsel again now, and I am not going to take up any more time on this, that I have no question about the man's qualifications elsewhere than Seattle. Try to qual-

(Testimony of Edgar F. Raymon.)

ify him for Seattle real estate if you wish to, and if you do not, proceed to something else.

Q. (By Mr. McKinnon): What work did you do during 1951 and 1952, sir?

A. Appraised properties for disposition, properties that were being disposed of in this area, or that they were getting ready to dispose of.

Q. What kind of property, sir?

A. So-called war housing, similar to the property at [13] Duwamish Bend.

Q. Did you as an employee of the Public Housing Administration have an occasion to make any appraisal of the value of Buildings 102, 103, 104 and 105 in the Duwamish Bend housing project at any time, whether it be in 1951, '52 or sometime in the more recent past?

A. Well, on this particular property it's been within the last year or year and a half.

The Court: Is the answer yes?

A. Yes, to that.

Q. (By Mr. McKinnon): Did you make an appraisal of the on site value of Buildings 102, 103, 104 and 105 as of the end of 1953?

A. I did, yes, sir.

Q. And what was your appraisal?

Mr. Iversen: I object to the question as immaterial to any issue in this case. There is nothing here that has any—the value of that property in 1953 can't even remotely bear on any damages the government——

(Testimony of Edgar F. Raymon.)

The Court: Can you tie it in as to the time at which the valuation is sought?

Mr. McKinnon: I submit, your Honor, it is not necessary to tie it in. The breach of the contract occurred on November 2, 1953.

Mr. Iversen: I'm not willing to concede that. [14] The breach of the contract occurred at the time when the time for removal expired, which was in 1954.

The Court: As I understand it, that is Counsel's theory, and the objection is overruled.

Mr. Iversen: I would like to object.

The Court: I have heard your objection.

Mr. Iversen: I would like to state it for the record, your Honor. I think this is important in this case. For the record I want to object to his giving any value here for the reason that it is immaterial to the measure of damages. The measure of damages in this case, the only one that can be found, is such damages as would put the government in the position they would have been in had the contract been carried out.

The Court: Mr. Iversen, I understand he is trying to qualify this witness to give evidence touching the issues in this case, and he is not asking about an issue of this case, he is asking a qualifying question.

Mr. Iversen: He has asked now, he asked a different question now. He has asked now for his appraisal as of 1953.

(Testimony of Edgar F. Raymon.)

The Court: At any rate the objection is overruled because as I understand this is Counsel's theory or at least one phase of his theory of the case, and I am not going to deny him the right to adduce evidence on [15] his theory. I may not consider it later. The Court may be of the opinion that his theory is not controlling. That is a matter for later determination. You may proceed.

Q. (By Mr. McKinnon): What was the total of your appraisal of the on site value of Buildings 102, 103, 104 and 105 as of the end of 1953?

A. \$132,636.58.

Q. Would your estimate be changed in any material degree if there were some slight change in the date, as for instance November 2nd, December 2nd, January 2nd, or any date in that approximate area?

A. No. That was in the period of the appraisal.

Mr. McKinnon: I have no further questions of this witness, your Honor.

Cross Examination

Q. (By Mr. Iversen): Mr. Raymon, what was that appraisal of \$103,000 based upon?

A. Based upon the value of the reproduction of the buildings at the fair unit costs that were used in the Seattle area at that time less the depreciation of the number of years that the buildings had remained on that site.

Q. Did you take into consideration what the

(Testimony of Edgar F. Raymon.)

buildings [16] actually sold for when they were put up for bid, for sale?

A. Yes. I used that in an off site determination, figuring that the price that was paid for the removal of the buildings was the best indication of what the value was.

Q. How much of this was attributed to the land values? A. None.

Q. This is simply reproduction new of these buildings, is that correct?

A. Less depreciation.

Q. Less depreciation? A. Yes, sir.

Q. What effect would you give to the fact that they might be required to be removed by the City within a certain length of time?

A. Well, the fact that at the time that I made this appraisal they were still on the site was a controlling factor, that they had not been removed, and after considering various elements that were possible in this appraisal I came to the point of reproduction less depreciation as the only logical approach to the value of the buildings other than off site.

Q. Now, that has no reference to reasonable market value, does it?

A. Yes, they were based—these figures were based on the [17] reasonable market value as of that time.

Q. What was the reasonable market value at that time? A. This same figure.

Q. Could you have sold them for that?

(Testimony of Edgar F. Raymon.)

A. I think so, yes. There was a possibility of it.

Q. Could you name anybody who would have been in the market for that kind of a building under the conditions as they were at that time in the condition they were in at that time?

A. Well, it's logical to assume, or I did assume that inasmuch as there were people interested in buying them and that they were then left on the site and utilized as I considered in the appraisal——

Q. Can you name any of the people who would have been interested in buying them at that time?

A. Well, it's like other real estate, you can't pick the purchaser. I never attempt to pick the purchaser in advance at the time of an appraisal.

Q. Well, naturally now, Mr. Raymon, there was no market for those buildings, was there, under those circumstances where they had not met City codes and they would have to be removed from the land within a certain time, now was there any market under those circumstances?

A. Well, there appears to have been, because the buildings as I see it were there when I made the appraisal, the [18] are still there.

Q. All right. Now, in what condition were they when you made the appraisal with reference to meeting City codes?

A. They didn't meet City codes in many respects, and I don't believe they still do.

Q. What would it have cost to bring them into conformity with City codes?

(Testimony of Edgar F. Raymon.)

A. That I don't know. That would be up to the purchaser.

Q. Did you take that into consideration in arriving at your figure?

A. Yes. The unit costs of these, the price, in other words, per square foot, would have been considerably higher if they had been considered in construction, they would have been considerably higher for the standard type of dwelling construction.

Q. How much did you take off for the fact they didn't meet City codes?

A. Well, they were figured at a square foot price of \$5.96 a square foot, and had it been standard construction it would have cost——

Q. No, let's talk about market value.

A. All right, but in getting at the market value, if this had been standard construction and had met the codes it would have been ten dollars per square foot or fairly close to it. [19]

Q. So how much did you take off?

A. I took off the difference between that and \$5.96 on the dwelling buildings.

Q. Let's get the whole thing. How many of them were there?

A. For all the dwelling buildings, they were all put in at a reproduction cost of \$5.96.

Q. Now, what consideration did you give to the fact that the land upon which they stood was owned by somebody else who wouldn't sell it to this purchaser?

A. Well, I was only asked to put a price on the

(Testimony of Edgar F. Raymon.)

buildings, and while I took up all the values of land in there as indicated by sales over several years and verified those sales and analyzed them, I didn't use those in connection with the value of the buildings.

Q. Now, in other words you're arriving at a market value without taking into consideration the fact that the land was owned by somebody else that might not have sold it? A. That's correct.

Q. And that would have made a sale virtually impossible, would it not?

A. Well, as I see it it didn't make a sale of the property impossible.

Q. All right, who was it sold to?

A. The property was bought by Messrs. Pague, Barnett, Owens and Mr. Ester. [20]

Q. They were the same people who had the land, too, were they not?

Mr. McKinnon: Objection, your Honor. That's a fact not in evidence.

Mr. Iversen: Well, it has been found by the Court in the findings. Of course that is all settled. That is part of the findings of the Court.

Mr. McKinnon: There is no question of the fact that some of this land is owned by the City. It is a matter of public record and the Court can take judicial notice of it.

The Court: The objection is overruled.

Q. (By Mr. Iversen): Did you answer the question?

A. Yes, I think so. I made the answer that the

(Testimony of Edgar F. Raymon.)

property had been acquired by the people who owned the buildings, and——

Q. Now, was that property marketable to anybody else besides those people for that figure that you gave?

A. Now you mean the building value?

Q. Was this property marketable to anybody besides Pague, Barnett, Owens or Ester at the price that you have named?

A. Well, I would think so, yes. At \$5.96 and then reducing that by thirty per cent for depreciation——

Q. Let's see now, you're figuring—you're going to get a value for on site sale to sell to somebody who does not [21] own the land, is that what you're doing?

A. Yes, sir.

Q. When you give that figure of \$103,000?

A. 132.

Q. \$132,000, and you think you could actually sell that property to somebody who didn't own and had no means of acquiring the land, is that correct?

Mr. McKinnon: Objection, your Honor. There is no evidence here that there were people with no means of acquiring it.

Mr. Iversen: He is selling it to outsiders now other than Pague, Barnett, Owens and Ester.

The Court: You are assuming a fact.

Mr. Iversen: No, these people own it. He is talking now about sales to other people, it is worth that if sold to the public, and he said other people would have bought it.

(Testimony of Edgar F. Raymon.)

The Court: I thought you said somebody about their not being able, something about their financial condition.

Mr. Iversen: No, I'm talking about the ability to acquire it.

The Court: The Court directs that you reframe the question if you wish to submit it.

Mr. Iversen: All right. [22]

Q. (By Mr. Iversen): Mr. Raymon, isn't your figure based upon the assumption that the purchaser of this land would be able also to acquire the land and the right to retain the buildings on the land?

A. Yes, under the assumption that this off site deal were not made.

Q. So if that were not true, then your estimate just wouldn't be valid at all, would it?

Mr. McKinnon: If what were not true, Mr. Iversen?

Q. (By Mr. Iversen): That your purchaser had the right to acquire the land and the right to maintain the buildings on the land.

A. Well, I'm putting a value on that on site as of the same date as the off site sale or approximately that date, and at that time they had not acquired the land under the buildings.

Q. Then you're undertaking to say that you could have sold the buildings for \$132,000 to people who had not acquired the land and did not know whether they could acquire the land at that time, is that right?

(Testimony of Edgar F. Raymon.)

Mr. McKinnon: Objection, your Honor. The witness is an expert, not a seller of real estate.

Mr. Iversen: He hasn't even qualified as an expert here yet. [23]

The Court: The Court rules that he has, and the objection is sustained. You may change the form of the question.

Q. (By Mr. Iversen): Mr. Raymon, what comparable sales in the vicinity did you take into consideration?

A. You mean of building sales?

Q. Well, you must have taken into consideration comparable sales.

A. I took some sales of vacant land in there at the time that I went out there.

Q. What comparable sales did you take into consideration of buildings on land owned by somebody else and which would have to be removed in any event in five years and which would have to be brought into conformity with City codes?

Mr. McKinnon: Objection, your Honor, to that part of the question which refers to which would have to be removed in five years in any event. There is no such evidence.

Mr. Iversen: That's in accord with the evidence which is already in here. The permit from the City gave them only five years.

Mr. McKinnon: The buildings are still there.

The Court: The objection is overruled.

A. It wasn't possible to make that kind of an investigation. There isn't such a structure in ex-

(Testimony of Edgar F. Raymon.)

istence that I know of [24] under the same conditions. The value of the buildings was determined by what the costs of such construction were in our own experience as of that date.

Q. (By Mr. Iversen): Actually then it did have no reference to the real market value of those buildings?

A. No supporting evidence from sales, let us say.

Q. And as a matter of fact you don't know of anybody who would have bought the property under those circumstances, do you?

A. Well, as a definite answer to that question I don't know of anyone who buys any property, but I——

Q. You weren't really acquainted with purchases and sales down in that end of the city, were you?

A. Well, I was as much as there were sales on record.

Q. All right. Were there any on record?

A. Not of those structures, no.

Q. Were there any of comparable structures?

A. There are no comparable structures.

Mr. Iversen: Then I move that this witness' testimony be stricken. He is not qualified as an expert.

The Court: The motion is denied. Counsel will have in mind the Court is not bound by any witness' testimony.

Mr. Iversen: That's all I have.

(Testimony of Edgar F. Raymon.)

Mr. McKinnon: No further questions, your Honor. [25]

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. McKinnon: Mr. Benson, please.

ALFRED P. BENSON

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKinnon): Would you give us, please, your full name and home address?

A. Alfred P. Benson, 1810 Bigelow Avenue North, Seattle.

Q. Where are you employed, Mr. Benson, and what is your position with that employer?

A. Seattle Housing Authority as controller.

Q. How long have you been associated with the Seattle Housing Authority?

A. Since November 15, 1943.

Q. What if any connection did the Seattle Housing Authority have with Buildings 102, 103, 104 and 105 in the Lanham Housing Project known as the Duwamish Bend Housing?

A. We managed them under lease with Federal Public Housing Authority.

Q. Do you know how many apartments in all were contained in [26] Buildings 102, 103, 104 and 105?

(Testimony of Alfred P. Benson.)

Mr. Iversen: I object to that. All this has been gone into long ago.

The Court: The objection is overruled.

A. Fifty-three.

Q. (By Mr. McKinnon): And when were those apartments last rented by the Public Housing Authority to the public?

A. Up until May 31, 1953.

Q. And as of May 31, 1953 was there one rental that was common to each of the apartments or did the apartments have different rentals?

A. There was one rental common to them at \$42.00 a month unfurnished.

Q. And how much furnished?

A. \$4.00 more furnished.

Q. Who owned the furniture?

A. The United States Government, Federal Public Housing Authority.

Q. Now, up until the time these apartments were withdrawn from the market sometime in 1953 prior to a sale for off site disposal, could you tell us whether they were fully occupied, nearly fully occupied, less than nearly fully occupied, sparsely occupied, or could you give us your own description of the kind of percentage of occupancy? [27]

Mr. Iversen: I object to this testimony as immaterial to any issue in this case.

The Court: Overruled.

A. In this group of units, there were one or two vacancies in them. They were about 95 per cent occupied at the time that we closed them down.

(Testimony of Alfred P. Benson.)

Q. (By Mr. McKinnon): And what did it cost to operate each of these units? What was the pro rata cost of operation of each of these apartments that rented for \$42.00 unfurnished or \$46.00 furnished?

A. This group of units, the cost of operating them was between \$26.00 and \$27.00 per month. That included heat which was furnished through central heating plants.

Q. Did you at any time make a computation of the exact amount? A. Yes.

Q. And what did you find? A. \$26.60.

Q. And did that include overhead?

A. Yes.

Q. Is it fair then to state that there was an income of \$15 a month from——

Mr. Iversen: I object to the leading question.

The Court: That objection is sustained.

Mr. McKinnon: All right. [28]

Q. (By Mr. McKinnon): Could you tell us, sir, what if any excess there was for each apartment of income over expense?

A. Around \$15 a month.

Q. And how many apartments were rented in any given month?

A. Well, the maximum would be 53.

Q. Could you give us a number which was the average or about the average number that were rented per month?

A. Well, they were filled up consistently. They were very popular. Being adjacent to Boeings and

(Testimony of Alfred P. Benson.)

being furnished, why we didn't have any trouble renting them, and I would say they were 95 per cent occupied at all times anyway.

Q. Now, did you continue with the Seattle Housing Authority after these buildings were sold to the Century Investment Corporation? A. Yes.

Q. And what was your position with the Seattle Housing Authority during the latter half of 1953 and the years 1954, '55 and the first half of 1956?

A. Controller.

Q. And did your work as controller have anything to do with rental of dwelling units similar to those contained in Buildings 102 through 105?

A. No.

Q. Did your work have any connection with the rental market [29] for dwellings?

A. Well, the applications records and the records of the tenants in possession and all that were available to me and I looked them over every once in a while, but they were not part of the records under my control.

Q. Do you know what happened to rentals of units operated by the Seattle Housing Authority from the middle of 1953 through the middle of 1956? In other words, did they remain constant, did they go up or did they go down or did something else happen to them?

A. No, in 1956 the rentals in our low rent units, so-called low rent units, decreased. We had—

Q. And in 1955?

A. In 19—they started sliding off in 1955 and

(Testimony of Alfred P. Benson.)

in 1956 they went—we had about 25 per cent vacancies, then they went up again in 1957.

Q. And in 1954 as compared with 1953?

A. 1954 was quite stable. They remained pretty high.

Q. Do you know what if any relationship the \$42 unfurnished rental of these apartments and the \$46 furnished rental had to the market price of competitive apartments not operated by the federal, state or city governments?

Mr. Iversen: I object to that question as having no bearing on any issue in this case.

The Court: What is your response, Mr. McKinnon? [30]

Mr. McKinnon: It is one of the contentions of the government in this case, your Honor, that our damages can be measured in part by ascertaining what the government could have received, the maximum rental it could have received, not the amount it would have given as a service to its inhabitants but the maximum it could as a hard-hearted landlord have received for these apartments if it had kept them as a commercial owner and operated them for a profit during the balance of the period of its lease, that is from the middle of 1953 through the middle of 1956.

Mr. Iversen: If the Court please, that illustrates exactly what I believe Counsel is driving at. He is going down an alley which does not conform to any possible measure of damages here. The government has sold these buildings. He is talking about

(Testimony of Alfred P. Benson.)

what would have happened if the government had done something else. We are in a case about a breach of contract. Now, the law on breach of contract is that the measure of damages is such damages as would put the other party in the same position as he would have been in had the contract been carried out.

Now, it is just not permissible to go into what would have happened if he hadn't made the contract. This is not an action to rescind the contract and we are [31] not talking about what would have happened if the government had made some other kind of a contract, but the only thing that is admissible here will be what damages will put the government in the position they would have been in had the contract been carried out, had the buildings been removed, and anything that undertakes to say what would have happened if the buildings had stayed there and the government had rented them is just incompetent in this case.

The Court: I need your further statement on that as not being evidence to prove what damages flowed from breach of contract.

Mr. McKinnon: The damages, your Honor, in the view of the plaintiff, are the damages to the plaintiff, and normally in breach of contract actions, as is pointed out in the plaintiff's memorandum on this second trial, the damage is the market value. However, where the circumstances are such that no market value can be fixed the measure of damages is the value of that damage or the value of the

(Testimony of Alfred P. Benson.)

thing lost to the plaintiff, not necessarily the value to someone else.

I gave an example of that in my trial brief, the Palin case, where the plaintiff had some material that no one else could throw away, not only wouldn't pay for it but most people would gladly pay to get rid of it, [32] he had 200,000 gallons of used automobile oil. It had no market value, the Court found it had no market value. No one would pay anything for it. Nevertheless the trial court allowed the plaintiff 12.1 cents a gallon, a total of \$24,200 for that oil, and the Supreme Court affirmed, holding that the measure in a case like this where there is no market value is the value to the plaintiff, not the value on the market.

Mr. Iversen: If the Court please, we are not talking about any loss of personal property here, we are talking about a failure to carry out a contract to remove certain buildings, and the law is very well settled on that. The law is stated in *Corpus Juris Secundum*, 25 *Corpus Juris Secundum* under Damages on Page 563, "In case of breach of contract, the measure of damages is the amount which will compensate the injured party for the loss which is a fulfillment of the contract would have prevented or the breach of it has entailed." And they go on to say, "The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or a breach of it has entailed. In other

(Testimony of Alfred P. Benson.)

words, the person injured is, so far as it is possible to do so by a monetary award, to be placed in the position he would have been in had [33] the contract been performed."

Another statement of the rule is that, "Where one party to a contract repudiates it, the other party is entitled to recover the value of the contract to him at the time of its breach. On the other hand, plaintiff is not entitled to be put in a better position by a recovery of damages for a breach of contract than he would have been in if there had been performance."

Now, that is pretty fundamental law, and I have cited a number of cases in my brief here, your Honor. The latest case is a Washington case, Lyle versus Heidner & Company, 45 Washington 2nd 806.

The Court: Do you contend it is a question of the difference in the contract consideration and the consideration received after the breach in an effort to——

Mr. Iversen: No, your Honor, I think that would be immaterial. The thing that is to be determined here is what payment of damages will put the government in the same position they would have been in had the contract been removed. In other words, now these must be pecuniary damages. The government must show, in order to recover here, that they would have been financially better off had the buildings been removed, so they must show what damages they suffered by the buildings not being

(Testimony of Alfred P. Benson.)

removed, and that sort of evidence would be relevant [34] here, but evidence as to what would have happened had they not made a contract just has no relevancy here because they did make a contract and they did sell this, and the only thing that we're talking about here is what monetary loss they had by the buildings not being removed, and the case that Counsel cites about a piece of personal property being lost isn't relevant because there is no personal property lost, the government sold these buildings and they got consideration for it and the Circuit Court of Appeals has found that they were sold and title passed.

Now, the government has not moved to rescind the sale, in fact they couldn't now, so we're not talking about any rescission of the sale, we're talking about this very simple thing, and that is, what damages will put the government in the same position they would have been in had the contract been carried out and the buildings removed. So anything about the buildings staying there has nothing to do with the measure of damages that we have before us.

Mr. McKinnon: Your Honor, as was pointed out in the rule suggested by Counsel, it is the damage to the plaintiff in a case such as this. I of course can't pick it out handily here, but that was one of the things in the quotation. Here, this is Section 74, "Another [35] statement of the rule is that where one party to a contract repudiates it,

(Testimony of Alfred P. Benson.)

the other party is entitled to recover the value of the contract to him at the time of its breach."

In other words, the plaintiff is entitled to recover the value of the contract to the plaintiff, not the value to some third party, not the value on the market, not the value to the defendant.

The Court: That is sufficient. The objection is overruled and the plaintiff is given three more minutes to finish its direct examination or to finish plaintiff's examination of this witness. You may proceed.

Mr. McKinnon: I have no further questions.

The Court: You may inquire. May I ask if the last question was answered? There was an objection. Did you get an answer?

The Reporter: I did not, your Honor.

Mr. McKinnon: May that question be repeated, please.

(The reporter read the last question as follows: "Q. Do you know what if any relationship the \$42 unfurnished rental of these apartments and the \$46 furnished rental had to the market price of [36] competitive apartments not operated by the federal, state or city governments?")

The Court: Answer yes or no.

A. Yes, it was a fair—it was—the apartments were operated under a rental that was supposed to be competitive. In other words, it was supposed to be a fair rental and not the same as we operate

(Testimony of Alfred P. Benson.)

now under a low rent rental where income and other factors enter into the rent.

Q. (By Mr. McKinnon): By "a fair rental" do you or do you not mean a rental that had a realistic relationship to the cost of the structures?

A. Yes, it did.

Mr. McKinnon: I have no further questions of this witness.

The Court: You may inquire. How much more time do you need?

Mr. Iversen: Not very much with this witness.

The Court: Very well.

Cross Examination

Q. (By Mr. Iversen): Mr. Benson, all these figures you have quoted had to do with rental of property that was not up to City building [37] codes, isn't that right?

A. Well, they weren't supposed to be, but as far as that's concerned I don't know, I'm not an engineer.

Q. The situation might have been different if the buildings had been altered to come up to City building codes, is that right?

A. Well, I don't think the rentals would have been increased.

Q. The costs of operation would have been increased though, would they not?

A. No, they wouldn't.

Q. And your investment would have been increased? A. No, they wouldn't.

(Testimony of Alfred P. Benson.)

Q. It wouldn't cost anything, then, that's your testimony, it wouldn't have cost anything to bring them up——

A. The cost of operation would have been cheaper.

Q. It wouldn't have cost anything to bring them up to City building codes, is that your testimony?

A. Yes, but the cost of operation would have been cheaper.

Q. It would have cost considerably, wouldn't it?

A. Yes, but I don't know how much.

Q. And that would throw all of your figures off, would it not?

A. Throw off what figures?

Q. Your figures.

Mr. McKinnon: I object to the question. [38]

A. They wouldn't have altered my figures at all.

Q. (By Mr. Iversen): Well, your figures wouldn't be relevant to what these might have been rented for if they had been brought up to the City building code?

A. The income would have been the same, the expenses probably would have been a little less.

Q. And you wouldn't take into consideration any cost at all for bringing them up, is that right?

A. No, because we didn't have to.

Q. So that you're not even taking into consideration any problem there of buildings that are rented after being brought up to City specifications, are you?

A. Public Housing paid for all construction. We didn't enter into that at all. All we were doing

(Testimony of Alfred P. Benson.)

was leasing and turning back the profit that we made out of the buildings to the federal government.

Q. As a matter of fact you really don't know anything about what the ratio would be to costs, costs and income, if you had to bring them up to specifications?

A. We didn't set the rents on that basis, we set them up under a fair competitive market.

Mr. Iversen: That's all I have.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness. [39]

Mr. McKinnon: The plaintiff rests, your Honor.

The Court: Any rebuttal? If so, proceed.

Mr. Iversen: No, your Honor. We move now that the matter be dismissed. There has been no case made out here. There has been no more testimony now than there was before as to any damage to the government.

The fact is that the only thing that is before the Court here is the question of the measure of damages. That's what the Circuit Court sent it back for. The only measure of damages——

The Court: I do not wish to hear argument. I wish you to have the opportunity to make your motions and state the basis of the motions, that is all.

Mr. Iversen: I move that the matter now be dismissed on the ground that there has been no proof of any damage in breach of contract.

The Court: Denied.

Mr. Iversen: May we argue it?

The Court: You may not. If you have any evidence, produce it and we will hear that.

Mr. Iversen: No, I will stand on that, your Honor.

Mr. McKinnon: The plaintiff finally rests, your Honor.

The Court: Any rebuttal or any evidence on the [40] part of the defendant?

Mr. Iversen: No, your Honor, we submit it.

The Court: You rest, is that right?

Mr. Iversen: Yes. I think we are entitled to argue it.

The Court: How much time do you need to argue it, Mr. Iversen?

Mr. Iversen: Well, it shouldn't take me too long but I would like to have about fifteen minutes.

The Court: How much do you need?

Mr. McKinnon: Five minutes, your Honor.

The Court: Then you may have the five minutes and you may have the fifteen, but do not take any more.

(Thereupon, oral argument was presented to the Court by Mr. McKinnon and Mr. Iversen, after which the following proceedings were had:)

The Court: From a preponderance of all of the evidence received in this case from the beginning of this case to the present time, all of which evidence has been considered by the Court, the Court does find, conclude and decide as follows:

On the question of how much damages did the

plaintiff sustain by reason of the breach of the contract for the sale to, and site removal of the buildings in [41] question by, the Century Investment Corporation, that the sum of \$15,000.00 is the fair, reasonable and just sum so sustained by the plaintiff on account of said breach of contract by the defendant Century Investment Corporation, for which sum and plaintiff's taxable costs plaintiff is entitled to judgment and decree against the defendant Century Investment Corporation, a corporation.

When can Counsel meet with the Court to settle and enter a proper judgment and decree?

Mr. McKinnon: Any time that is convenient with Mr. Iversen, your Honor. May I ask if the judgment may include interest from January 1st, 1954?

The Court: Yes.

Mr. McKinnon: Thank you.

Mr. Iversen: Your Honor please, on the matter of interest, I believe that would be error because interest would not accrue on an unliquidated amount. This is not a liquidated amount.

The Court: The Court amends the statement by advising Counsel on both sides the Court allows no interest up until this date because until this date the amount has not been determined and it has not been clear what the amount was until this date.

Mr. McKinnon: Would the Court be interested in citations on Washington law on the right to interest? [42] I don't dispute the fact it is within the Court's discretion.

The Court: I do not wish to hear anything further on either the law or the facts.

Mr. McKinnon: Thank you, your Honor.

The Court: The matter is continued until next Monday afternoon at 2:00 o'clock for the purpose of settling proper findings, conclusions and judgment and decree in this case as to the decision just announced. All those connected with this case are excused until then. [43]

[Endorsed]: Filed December 15, 1958.

[Endorsed]: No. 16360. United States Court of Appeals for the Ninth Circuit. Century Investment Corporation, Appellant, vs. United States of America, and Don S. Griffith, Special Master, Appellees. Virgil J. Pague, Appellant, vs. Don S. Griffith, Special Master, Appellee. United States of America, Appellant, vs. Donald F. Owens, et al., Appellees. Edward R. Ester, et al., Appellants, vs. Don S. Griffith, Special Master, Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed and Docketed: February 12, 1959.

Supplemental Filed June 4, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16360

CENTURY INVESTMENT CORPORATION,
Appellant, vs. DON S. GRIFFITH, Appellee,
and UNITED STATES OF AMERICA, Ap-
pellee and Cross Appellant.

VIRGIL J. PAGUE, Appellant, vs. DON S. GRIF-
FITH, Appellee, and UNITED STATES OF
AMERICA, Appellee and Cross Appellant.

ARTHUR G. BARNETT, DONALD F. OWENS
and EDWARD R. ESTER, Appellants, vs.
DON S. GRIFFITH, Appellee, and UNITED
STATES OF AMERICA, Appellee and Cross
Appellant.

STIPULATION REGARDING
PRINTED RECORD

It Is Hereby Stipulated among the undersigned attorneys of record for the various parties above named that the printed transcript of record in the previous appeal in this case, the same having been docketed as No. 15219, entitled: "Century Investment Corporation and Virgil J. Pague, Appellants, vs. United States of America, Appellee; Arthur G. Barnett, et al., Appellants, vs. United States of America, Appellee, may be considered by the court in this appeal along with such portions of the rec-

ord as any of the parties may designate for printing pursuant to paragraph 6 of Rule 17 of the rules of this Court.

LYCETTE, DIAMOND &
SYLVESTER,

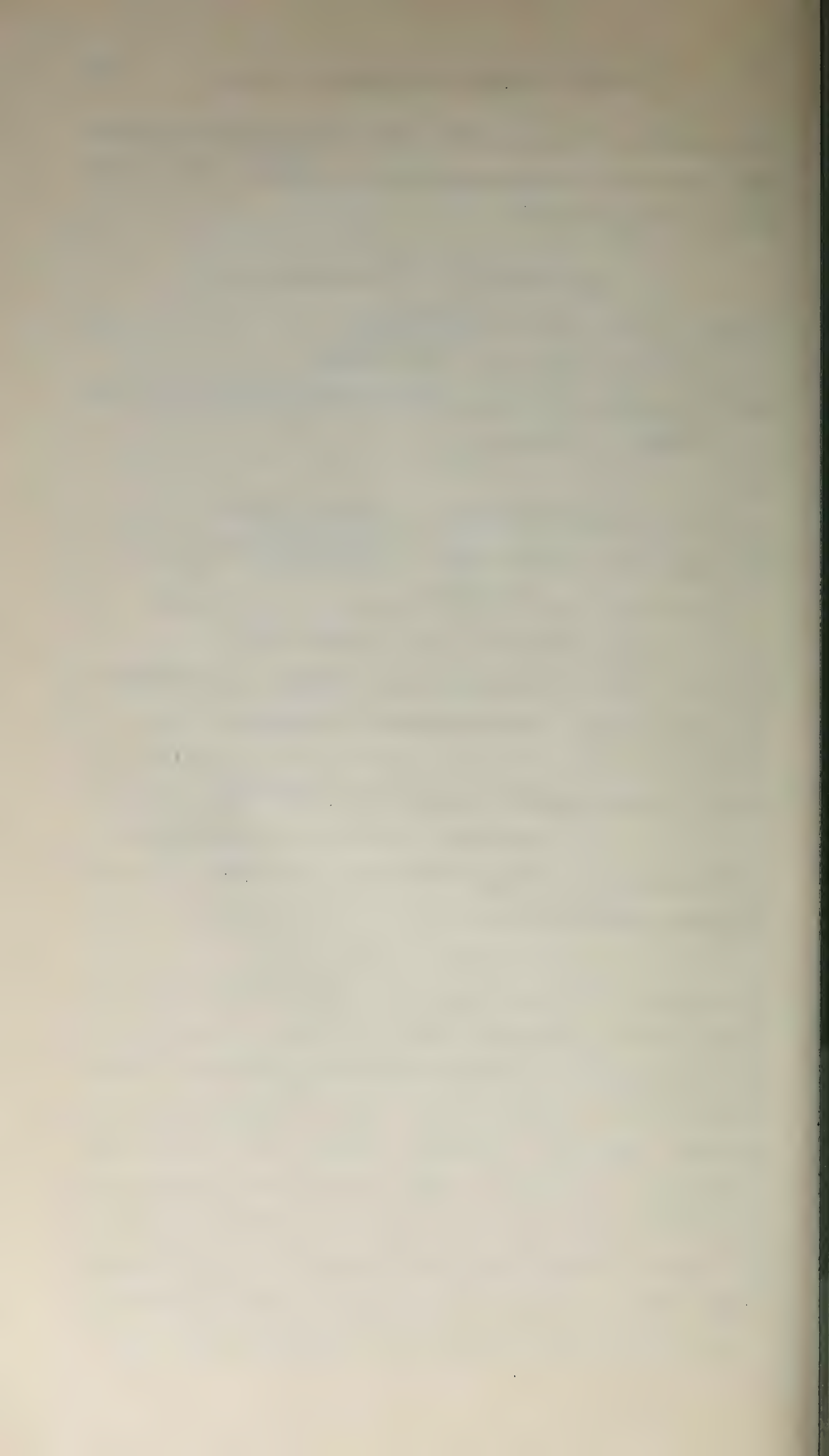
/s/ By LYLE L. IVERSEN,
Attorneys for Century Investment Corporation and
Virgil J. Pague.

/s/ CHARLES P. MORIARTY,
Attorney for United States of
America.

/s/ ARTHUR G. BARNETT,
Attorneys for Arthur G. Barnett
and Donald F. Owens.

/s/ ARTHUR G. BARNETT,
Attorney for Edward R. Ester.

[Endorsed]: Filed February 28, 1959. Paul P.
O'Brien, Clerk.



No. 16,362 ✓

United States Court of Appeals
For the Ninth Circuit

BERTHA SOLTERMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for
the Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

LEON SCHILLER,

CYRIL LOUIS WEEKS,

LANSBURGH, HOFFMAN & SCHILLER,

105 Montgomery Street, San Francisco 4, California,

Attorneys for Appellant.

FILED

JUN - 5 1959

PAUL P. O'BRIEN, CLERK

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No. 16,362

**United States Court of Appeals
For the Ninth Circuit**

BERTHA SOLTERMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court for
the Northern District of California,
Southern Division.**

APPELLANT'S OPENING BRIEF.

I. JURISDICTION.

This appeal is from a judgment in favor of the appellee rendered in the United States District Court for the Northern District of California, Southern Division, in an action brought by appellee pursuant to provisions of U.S.C. Title 26, Section 7405(b), for the recovery of a refund of income taxes alleged to have been erroneously made to the defendant (R. 3).

The complaint alleged facts showing venue in the District Court pursuant to U.S.C. Title 28, Sec. 1396 (R. 3).

Judgment was entered on September 4, 1958 (R. 25-26). Notice of appeal to this court was filed with

the District Court on October 31, 1958 (R. 26-27) pursuant to the provisions of Sections 1291 and 1294(1) of 28 U.S.C. and within the time prescribed by Rule 73(a) of Federal Rules of Civil Procedure, 28 U.S.C.

II. STATUTES INVOLVED.

The pertinent portion of the Internal Revenue Code involved, and in effect at the time in question, is as follows:

1939 I.R.C. Section 22 on Gross Income.

“(k) Alimony, etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments . . . received subsequent to such decree in discharge of, . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife.”

III. STATEMENT OF CASE.

This proceeding involves the proper determination of appellant's liability for federal income taxes for the years 1945-1951, inclusively.

Appellant was divorced from her former husband on September 13, 1945 (R. 14-15). By the terms of their separation agreement, which was incorporated by reference in the decree of divorce, appellant was to

receive \$250.00 per month during her life, whether or not she thereafter married, and in addition the former husband agreed to maintain a \$30,000.00 life insurance policy on his life, the appellant to remain the beneficiary on said policy (R. 14-15). On July 7, 1952, appellant filed her income tax returns for the years 1945-1951, inclusive, and reported as taxable income the monthly payments received from her former husband and the insurance premiums paid by him on the life insurance policy (R. 16). Subsequently the Supreme Court of Florida, in an adversary non-collusive proceeding in which the former husband sought to modify the divorce decree, held that the payments received by the appellant or paid on the life insurance policy were payments for property rights and were part of a property settlement (R. 15). Thereafter, appellant filed claims for refund of the income taxes paid for the years 1945-1951, inclusive, on the monthly payments and insurance premiums (R. 16), and said claims for refund were allowed by the Commissioner of Internal Revenue and the refunds were accordingly made (R. 16-17). This proceeding was filed by appellee to recover the entire refund and was brought shortly before the expiration of the statute of limitations (R. 5-6).

The trial court determined that the former husband retained the right to change the beneficiary on the aforementioned life insurance policy, the right to borrow on the policy, and all other incidents of ownership in said policy, and that the premiums were not taxable income to the appellant (R. 19-20). The trial

court determined that the monthly payments were taxable to appellant under Section 22(k) of the Internal Revenue Code.

Appellant urges that said monthly payments were in payment for appellant's property rights and therefore not taxable under said Section 22(k) or, in the alternative, that said monthly payments were for the two purposes of in part paying appellant for property rights and in part for settling the legal obligation imposed upon the former husband because of the marital relationship and that the appellee has failed to sustain its burden of proof in establishing what portion, if any, of said monthly payments was in settlement of said legal obligation imposed by the marital relationship.

Therefore, the questions before this court are:

1. Did the appellant have a property interest in the business operated by her husband as a sole proprietorship, which interest was acquired as a result of her contribution of industry and labor to that business?

2. Was the trial court bound by the determination of the Supreme Court of the State of Florida that the appellant had an interest in said business and that the payments here in issue settled appellant's property rights in said business?

3. Assuming that appellee established that the monthly payments in issue were both in settlement of property rights and in addition in discharge of the marital obligation to support, is the trial court in

error in concluding that such proof establishes said monthly payments to be fully taxable to appellant despite the fact that appellee has failed to establish what portion of said monthly payments were in discharge of the marital obligation to support?

4. To what legal obligation imposed upon the husband does Section 22(k) 1939 I.R.C. refer?

IV. SPECIFICATION OF ERRORS.

1. The trial court erred in not determining that the payments in issue were in payment for appellant's property rights or, in the alternative, in determining that the payments in issue were fully taxable under Section 22(k) 1939 I.R.C. upon proof satisfactory to the court that said payments were only partially in satisfaction or discharge of the obligation to support appellant.

2. Finding of Fact No. 14 is in error in that it states appellant worked at the family jewelry store from time to time during her marriage, whereas the evidence established that she worked full-time every business day for nineteen years in said business. Said Finding of Fact is further in error in that it states that appellant received compensation in salary which she used for joint living expenses, when in fact she was paid a so-called salary for only the last five of the nineteen years in which she contributed her services and said so-called salary was in fact used to pay the joint living expenses of appellant and her former husband.

3. Finding of Fact No. 17 is in error in that the trial court determined that it was not bound by the determination of the Supreme Court of Florida that the payments here in issue were payments for appellant's interest in her husband's business, when in fact the trial court was bound by that determination.

4. Conclusion of Law No. 4 is in error in that the monthly payments here in issue were made in payment of appellant's property rights and not in discharge of a legal obligation imposed upon or incurred by the husband because of the marital relationship or, in the alternative, said payments were in part in payment of appellant's property rights and in part for settling the legal obligation imposed upon the former husband because of the marital relationship, and the appellee has failed to sustain its burden of proof in establishing what portion of any of said monthly payments was in settlement of the legal obligation imposed by the marital relationship.

5. Conclusion of Law No. 5 is in error in that the appellant is not indebted to appellee in any sum.

6. The trial court was in error in granting judgment for appellee.

V. ARGUMENT.

A. SUMMARY OF ARGUMENT.

This is an action for recovery of an alleged erroneous income tax refund. The burden of proof is therefore upon the appellee. Appellee contends that certain monthly payments made to appellant were in dis-

charge of appellant's former husband's marital obligations of support and maintenance and therefore taxable under Section 22(k) 1939 I.R.C. Appellee apparently convinced the trial court that although the payments in issue settled appellant's property rights, they were also in discharge of said marital obligation to support, and the trial court concluded that this was sufficient proof to enable him to determine that the entire amount of said monthly payments was taxable to appellant under Section 22(k). We respectfully submit that the failure of appellee to establish what portion of said monthly payments, if any, were taxable under Section 22(k) resulted in a failure of proof on the part of appellee and therefore the judgment of the trial court is in error.

We submit further that the evidence establishes that appellant had a property right in her husband's sole proprietorship business and that the payments here in issue were made in settlement of that property right. Furthermore, the Supreme Court of Florida so held in an adversary proceeding between appellant and her former husband, and this decision is binding on the federal courts.

The legal obligation imposed upon the husband, to which Section 22(k) I.R.C. refers, is the husband's general obligation to support and therefore does not refer to the obligation to settle the property rights of the wife.

B. THE FACTS.

Appellant and her former husband (hereinafter called Mr. Underwood), then residents of Florida, were divorced on September 13, 1945, terminating a marriage of twenty-four years (R. 14-15; R. 29). Mr. Underwood was a retail jeweler. He started a store in Palatka, Florida, approximately nineteen years before the divorce and then moved to a larger location about one year later. Fourteen years later, he opened a store in Jacksonville, Florida, which business was still owned at the time of the divorce (R. 17; R. 30-31). The Palatka business was started with \$100.00 appellant saved from her household money (R. 64, 56). The stores were sole proprietorships of Mr. Underwood (R. 17; R. 31). Appellant worked full-time every day in the business during the entire nineteen-year period (R. 30, 32, 56). She performed about 80% of the buying of all merchandise in the gift department, which included a bridal department requiring buying of chinaware, silver and glass and purchased all the inexpensive solid gold jewelry (R. 38). She dressed the windows and showcases in both stores (R. 57).

At the time of the divorce, the only property or assets owned by either the appellant or Mr. Underwood was the jewelry business (R. 17).

Within a week of the time in which the parties were divorced, Mr. Underwood told appellant that he wanted a divorce (R. 47-48; 57-60). He informed appellant that he would pay her \$250.00 a month for the rest of her life, plus the insurance of \$30,000.00

if he died, all in payment for her contribution in services in the business (R. 48, 60). The store had little cash, and Mr. Underwood informed appellant he could only pay her \$250.00 per month and maintain the insurance premiums (R. 47, 60). When Mr. Underwood informed appellant he wanted a divorce, appellant informed him she didn't know a lawyer (R. 48). Mr. Underwood informed her he had a lawyer friend, and Mr. Underwood and appellant went to the office of the lawyer selected by Mr. Underwood the same week. Mr. Underwood informed the lawyer of the payments he would make to and in behalf of appellant (R. 48). Mr. Underwood did not bring to this meeting the attorney who represented him at the divorce hearing (R. 59). Appellant never saw her attorney except when Mr. Underwood was present (R. 49) and never conferred again with her lawyer (R. 61). The attorney selected by Mr. Underwood prepared the separation agreement by the day after the meeting, and the divorce was granted two days later (R. 61). The separation agreement described the monthly payments and insurance premium payments as and for alimony and in satisfaction of the husband's obligation to maintain and support the wife (R. 12).

In 1952, after appellant's remarriage, Mr. Underwood petitioned the Circuit Court of Duval County, Florida, to modify its decree by releasing him from any further payments, and said court modified the decree, releasing Mr. Underwood from making any further payments, which payments it designated as

alimony. Appellant appealed the decision modifying the decree to the Supreme Court of Florida, which reversed the Circuit Court and ordered the payments, specifically adjudged to be payments for "property rights" and to represent a "property settlement" to be continued (R. 15).

Subsequently appellant filed claims for refund to recover the taxes paid on the monthly payments and on the insurance premiums, which claims were subsequently allowed by the Internal Revenue Service, which was then followed by this suit to recover said refund, all of which has been described in the Statement of Case above.

C. THE LAW.

I. THIS APPEAL RELATES TO AN ACTION FOR RECOVERY OF AN ALLEGED ERRONEOUS REFUND AND THEREFORE THE BURDEN OF PROOF IS UPON APPELLEE TO ESTABLISH THAT APPELLANT RECEIVED TAXABLE INCOME, AND THE AMOUNT OF THE TAXABLE INCOME.

The burden of proof is upon the Government in an action for the recovery of an alleged erroneous refund of income taxes.

U. S. v. Wood (1935) (C.A. 3) 79 F. 2d 286;
U. S. v. Brown, Inc. (D.C.) 38-1 U.S.T.C., Par. 9131.

We respectfully submit that the basic error of the trial court was in overlooking this fundamental rule of law.

Thus the court concluded that although it was satisfied the payments in issue settled both property rights

and also discharged the obligation of support and maintenance, nevertheless the payments in their entirety were taxable income under Section 22(k) I.R.C. In this respect the court stated in its memorandum opinion (R. 12-13):

“Conceding that the obligation incurred and imposed by the agreement and decree settled and disposed of property rights as between the defendant and her former husband, it appears clear to the court from the evidence that the obligation was also ‘in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband.’ . . .

“. . . The former husband it would appear was initially seeking to settle property rights and also assume and provide for other marital obligations including support and maintenance.”

The court’s conclusion confuses procedural law with substantive law. It is the rule of substantive law that a payment to satisfy property rights is exempt under Section 22(k) I.R.C.¹ It is a rule of substantive law that a periodic payment to settle the obligation of support and maintenance is taxable under Section 22(k).¹ It necessarily follows that a single payment which settled both property rights and the marital obligation for support and maintenance would be partially exempt and partially taxable. However, when a single payment is made to discharge both property rights and the obligation of support and maintenance,

¹See portion of Appellant’s Opening Brief below entitled “The Legal Obligation Imposed upon the Husband to Which Sec. 22(k) I.R.C. Refers is the General Obligation to Support Imposed upon the Husband.”

the procedural law determines upon whom the burden of proof is placed for establishing the allocation. Thus, in *Thorsness v. U. S.* (1948) (C.A. 7) 260 F. 2d 341, the taxpayer, who had the burden of proof, asserted that certain payments made to his former wife were in discharge of his obligation to support her. The Commissioner of Internal Revenue contended that the payments were in repayment of loans and that said payments were not deductible. The court said at p. 344:

“Thus it cannot be held as a matter of law from the terms of the agreement that the payments were *solely* in discharge of a marital obligation. The most that can be said is that they might have been in part for such purpose and in part for the repayment of loans. Assuming that such was the case, the burden was upon plaintiff to prove what portion of the payments were deductible under the statute. This he made no effort to do.”

Thorsness, who had the burden of proof, could therefore secure no deduction for alimony paid his wife by establishing that the payments he made to her were in part for alimony and in part for the repayment of loans, when he failed to prove what part was alimony.

In the instant case it is clear that the trial court did not hold, and could not hold, that the payments were solely in discharge of the marital obligation. The trial court was satisfied that the most that could be said was that the payments were in part property settlement and in part to settle the marital obligation of support and maintenance. If we accept the trial

court's conclusion, is it not plain that the burden was then upon appellee to prove what portion of the payments were taxable under Section 22(k) I.R.C.? Appellee made no effort to do so. Appellee has therefore woefully failed to carry its burden of proof, and upon this failure of proof alone, the judgment of the trial court must be reversed.

II. APPELLANT CONTRIBUTED INDUSTRY AND LABOR TO THE BUSINESS OPERATED AS A SOLE PROPRIETORSHIP BY HER HUSBAND DURING THEIR MARRIAGE AND THUS ACQUIRED A PROPERTY INTEREST IN SAID BUSINESS, WHICH INTEREST SHE OWNED AT THE TIME OF THE DIVORCE.

Under the laws of the State of Florida, a wife who contributes her industry and labor to a business operated by her husband, acquires a property interest in that business.

Engebretsen v. Engebretsen, 11 So. 2d 322, 151 Fla. 372 (1942);

Dupree v. Dupree, 23 So. 2d 554, 156 Fla. 455 (1945);

Foreman v. Foreman, 40 So. 2d 560 (1949);

Underwood v. Underwood, 64 So. 2d 281 (1953);²

Strauss v. Strauss, 3 So. 2d 727, 148 Fla. 23 (1941).

Thus, in *Engebretsen v. Engebretsen*, supra, where a wife contributed her services for a period of twelve years in helping her husband acquire various properties, the husband was required to transfer to his

²The case of *Underwood v. Underwood* involved Bertha Soltermann, the appellant in the present action, and her former husband, Herbert Underwood.

wife two-fifths of the value of all the real and personal property he owned at the time of their divorce, and the state supreme court said at p. 390:

“When a wife contributes her industry and labor, or when she advances money to a business operated by her husband during coverture, she cannot be deprived of her property, because the law will not permit or allow a forfeiture thereof to the husband when marital difficulties appear on the horizon, but the fruits of her labor and industry, or the money advanced, are special equities for adjudication.”

In *Dupree v. Dupree*, supra, where the trial court awarded a wife only alimony although the facts showed she had contributed money and services in assisting her husband to develop his citrus groves, the Supreme Court reversed the judgment and remanded the case to the lower court and instructed the court to award the wife a portion of the husband's property as well as alimony.

In *Foreman v. Foreman*, supra, the husband was granted a divorce on the ground of adultery, and the trial court awarded the wife nothing because under the laws of the State of Florida, a wife forfeits all right to support and maintenance where the husband is granted the divorce on the ground of adultery. The evidence showed, however, that the wife had contributed her industry and labor to businesses owned by the husband during the entire marriage of the parties. The Supreme Court held that the trial court erred in determining that the wife's interest in the husband's

property should be forfeited and remanded the case to the trial court with instructions to allow the wife her just portion of the property, which she had acquired by her contributions of industry and labor.

In *Underwood v. Underwood*, supra, the Supreme Court of Florida held that certain monthly payments to be made to the wife during her life, which payments were to continue even though she remarried, and certain payments of premiums on a life insurance policy on the life of the husband, in which the wife was the beneficiary, were payments in settlement of the wife's property interest and were not alimony, where the record showed that the wife had for many years contributed her industry and labor to the husband's business.

In *Strauss v. Strauss*, supra, the court held the wife had a property interest in her husband's property where she had aided him in acquiring the property, and said at pp. 27 and 28:

“In the Southwest, where community property is recognized, the husband and wife share equally in all property accumulated during coverture. There is a perfectly sound basis for this rule and it will be applied in this state when the circumstances warrant.”

Thus, apart from the question of the binding effect of the decision of the Supreme Court of the State of Florida in *Underwood v. Underwood*, the trial court should have found from the evidence before it that the payments here in question were payments in settlement of appellant's property rights.

It should be observed that appellant testified that the payments here in issue were made in settlement for her nineteen years of service in the business (R. 43). She testified there never was any alimony (R. 45); that this was a property settlement; and that her husband couldn't pay her a lump-sum at the time of the divorce so she agreed to the monthly payments of \$250.00 (R. 47). It is clear from the court's memorandum opinion, as reflected in the portions quoted above, that the trial court was convinced from the evidence that appellant disposed of property rights and that the parties sought to settle property rights, although the court did not agree that the parties settled only property rights. The only evidence in this case to refute appellant's testimony that the payments were solely for property rights was the language in the separation agreement and in the decree that the payments were for alimony and in full and complete satisfaction of the husband's obligation to maintain and support the wife. The evidence established, however, that appellant knew no attorney at the time of the contemplated divorce; that her husband chose her attorney and that the attorney drew the agreement after one conference with both parties; that appellant never consulted her attorney alone at any time; and that her husband did not even bring his own attorney to the conference with his wife and his wife's attorney, apparently feeling he did not need other counsel (R. 48, 49, 59-61). It is obvious that the husband was seeking a tax benefit to which he wasn't entitled, by having the agreement phrased in a man-

ner inconsistent with the facts. The Supreme Court of Florida was not impressed with Mr. Underwood's attempt to use words which did not express the true agreement of the parties, and in that respect said:

“At the very outset we dispose of the legal effect of the word ‘alimony’ in the agreement and decree. It is not what it is *called*, but what it *is* that fixes the legal status. It is the *substance*, and not the *form*, which is controlling.” (Appendix B.)

We submit that on the record the trial court should have found that the payments in issue were solely for appellant's property rights. However, appellant's success in this appeal does not depend upon establishing this fact, but only in establishing that the payments were in part for her property rights, and this has been established to the satisfaction of the trial court.

We should not leave unnoticed the court's Finding of Fact No. 14, wherein the court found that appellant worked at the jewelry store from time to time during her marriage to Mr. Underwood and received therefor compensation and salary which she used for joint living expenses. The evidence established that appellant worked for nineteen years in the family business and that she worked full-time every business day (R. 30, 32, 56). She received a so-called salary of \$65.00 per week during the last five years of her service, which money she used to pay the family rent, food bills, and other family and household expenses, and all this money had been spent at the time of the divorce (R. 32, 39, 46-47, 54-55). Thus, the only asset owned by the parties at the time of the divorce was

the business. The record is crystal-clear that the only property the parties had to divide at the time of the divorce was the jewelry business, and Mr. Underwood received that. Appellant contributed nineteen years' work to the business, and at the time of the divorce received nothing except the amounts Mr. Underwood agreed to pay to her and the benefit of the premiums he agreed to pay on his life insurance, and these payments to her or in her behalf were the only property settlement she ever received.

III. STATE LAW CONTROLS IN DETERMINING THE EXISTENCE OF PROPERTY RIGHTS OR PROPERTY INTERESTS, AND THE DECISIONS OF THE STATE COURTS IN DETERMINING PROPERTY RIGHTS OR INTERESTS ARE BINDING ON THE FEDERAL COURTS.

The existence of property rights or property interests must be determined by state law, and the decisions of state courts upon these questions are final.

Blair v. Commissioner, 300 U.S. 5, 81 L. Ed. 465, 57 S. Ct. 330 (1937);

Helvering v. Stuart, 317 U.S. 154, 87 L. Ed. 154, 63 S. Ct. 140 (1942);

Magruder v. Supple, 316 U.S. 394, 86 L. Ed. 1555, 62 S. Ct. 1162 (1945);

Tyler v. U. S., 281 U.S. 497, 74 L. Ed. 991, 50 S. Ct. 256 (1930);

Fidelity & Deposit Co. of Maryland v. N.Y. City Housing Authority (C.A. 2) 241 F. 2d 142 (1957);

J. Earl Morgan v. Commissioner, 309 U.S. 78, 60 S. Ct. 424, 84 L. Ed. 585 (1940);

Freuler v. Helvering, 291 U.S. 35, 54 S. Ct. 308, 78 L. Ed. 634;

Talcott v. United States (C.A. 9) 23 F. 2d 897 (1928).

Thus, in *Blair v. Commissioner*, *supra*, the Supreme Court said at pp. 9 and 10:

“The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois, and his disposition of the property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final.”

In *Helvering v. Stuart*, *supra*, where an issue was whether title to a trust corpus could be re-vested in the grantor, the Supreme Court said with regard to this issue at p. 162:

“Whether that event may or may not occur depends upon the interpretation placed upon the terms of the instrument by state law.”

In *Magruder v. Supple*, *supra*, where the issue was whether there was a lien for state property taxes on certain Maryland real property, the Supreme Court said at p. 396:

“Resort must be had here to the laws of Maryland and of the City of Baltimore to determine upon whom the state and city real estate taxes were imposed.”

In *Tyler v. U. S.*, supra, where an issue was whether certain personal property was owned by a husband and wife as tenants by the entirety, the Supreme Court said at p. 501:

“The decisions of the courts of Maryland . . . follow the common law. . . . In Maryland, such a tenancy may exist in personal property as well as in real estate. These decisions establish a state rule of property, by which, of course, this court is bound.”

In *Freuler v. Helvering*, supra, in which an issue was when a trust was distributable under California law, the Supreme Court said at p. 312:

“Moreover, the decision of that court [referring to the state court] until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is nonetheless a declaration of the law of the state because not based on a statute, or earlier, decisions. The rights of the beneficiaries are property rights and the court [the state court] has adjudicated them.”

As was well stated by the Court in *Estate of A. Bluestein v. C.I.R.*, 15 T.C. 770, at p. 783, where the issue concerned the ownership of certain property:

“The rule has been settled in *Freuler v. Helvering*, 291 U.S. 35, that on a question of property rights we are bound by the decision of the State court, if, in that proceeding, there was a real controversy to be settled and in which the facts and issues were fully and properly presented. But, on the other hand, we should not recognize and give effect to the decision of the State court in a pro-

ceeding which was 'collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax.' "

Despite this overwhelming array of authorities, the trial court held that the determination by the Supreme Court of Florida in *Underwood v. Underwood* wasn't binding on the trial court because the Government was not a party to the state court litigation and because the issue now is liability for federal income taxes. In all the cases herein cited as authority, the Government was not a party to any of the state court proceedings and the issue was federal taxes, and yet the determination of property rights in state courts was binding on the Government. The Government can object to the state court proceeding only when it is collusive, in the sense that the parties are attempting to secure a decision adversely affecting the Government's right to collect taxes. The *Underwood v. Underwood* case was obviously not in that category, but was a true adversary proceeding, contested through the Supreme Court of the State of Florida.

The trial court's statement that it is not bound by the state court decision because this case involves liability for federal income tax, confuses the question of the existence of property rights with the question of the power of the Government to tax such property rights once created. As was well stated by the Supreme Court in *J. Earl Morgan v. Commissioner of Internal Revenue*, *supra*, at p. 80:

“State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.”

The only way that the trial court could determine whether or not appellant owned a property interest in the family business at the time of her divorce was to apply the law of Florida. No federal statute or decision would be applicable to the determination of that question. Thus the trial court would be merely retrying the issue already fully litigated in that state court proceeding, and this is forbidden under the principles established by the above decisions. The trial court did have the jurisdiction to determine whether or not payments for property rights come within the definition of taxable income, as taxable income is defined by Section 22(k), 1939 I.R.C. We respectfully submit that the legal authorities presented in the next section of this brief establish clearly that said revenue code section does not apply to payments made by a husband in settlement of his wife's property rights.

IV. THE LEGAL OBLIGATION IMPOSED UPON THE HUSBAND TO WHICH SEC. 22(k), 1939 I.R.C. REFERS IS THE GENERAL OBLIGATION TO SUPPORT IMPOSED UPON THE HUSBAND.

Section 22(k), 1939 I.R.C., was made a part of the code by section 120(a) of the 1942 Revenue Act. The report of the House Committee stated in reference to this new section:

“This section applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general

obligation to support, which is made specific by the instrument or decree.”

Committee on Ways and Means Report No. 2333, 77th Congress, 2nd Session, p. 72.

Reg. 111, Sec. 29.22(k) 1 (as amended by T.D. 5425, December 29, 1944, and T.D. 5600, February 2, 1948) provides as follows with regard to this question:

“Sec. 22(k) provides rules for treatment in certain cases for payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. . . .

“Section 22(k) applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree.”

This Court in *Commissioner of Internal Revenue v. Miller* (1952) 199 F. 2d 597, cited the Committee on Ways and Means Report No. 2333, quoted from above, and said at p. 599:

“Section 22(k) was interpolated into the revenue laws in 1942. The apparent thought of Congress in enacting it was that the wife should, in fairness, be charged with and the husband to deduct, for income tax purposes, the payments of the latter for alimony and for separate maintenance or support in the nature of or in lieu of alimony.”

In *Commissioner of Internal Revenue v. Senter* (1957) (C.A. 4) 242 F. 2d 400, the Court said at p. 403:

“The purpose of 22(k) and 23(u) was to provide for a division of the taxability of income where the income itself was divided between husband and wife pursuant to a divorce or separation agreement, not to tax or to grant deductions with respect to divisions or transfers of property made in final settlement of marital controversies.”

In *Newton v. Pedrick* (1954) (C.A. 2) 212 F. 2d 357, the Court said at p. 361:

“... Section 22(k) also requires that deductible payments must be in discharge of a legal obligation incurred ‘because of the marital or family relationship.’ Legislative history indicates that the legal obligation to which the statute refers must be in recognition of the general obligation to support. . . . See Sen. Rep. No. 1631, 77th Cong., 2d Sess. 84 (1942).”

In *John Sidney Thompson*, 22 T.C. 275, and in *Campbell v. Lake* (1955) (C.A. 7) 220 F. 2d 341, monthly payments to a wife were held to be in settlement of her community property rights and not in settlement of support rights and therefore not deductible by the husband or taxable to the wife.

It is therefore clearly established that payments to a wife for her property interests are not taxable under section 22(k), but only periodic payments made to the wife in discharge of the general obligation to support are taxable to the wife. Thus, the payments to appellant are exempt from taxes as the appellee has not met its burden of proof in establishing what portion, if any, of said payments was made to discharge the legal obligation to support.

VI. CONCLUSION.

It is respectfully submitted that the judgment of the trial court should be reversed.

Dated, San Francisco, California,
May 25, 1959.

LEON SCHILLER,
CYRIL LOUIS WEEKS,
LANSBURGH, HOFFMAN & SCHILLER,
Attorneys for Appellant.

(Appendices A and B Follow.)

Appendix "A"

Appendix A

EXHIBITS WHICH ARE PART OF RECORD

<u>Number of Exhibit</u>	<u>Description</u>	<u>Page References to the Record</u>		
		<u>Exhibit Identified</u>	<u>Exhibit Offered</u>	<u>Exhibit Received</u>
1	Separation Agreement	R 33	R 33	R 33
2	Final Decree of Divorce.....	R 34	R 34	R 34
3	Amendment to Final Decree of Divorce	R 34	R 34	R 34
4A-4G	Tax Returns for Appellant for 1945-1951	R 35	R 35	R 35
5A-5G	Claims for Refund of Appel- lant for 1945-1951	R 36	R 36	R 37
6A-6B	Tax refund checks	R 37	R 37	R 37
7	Letter demanding repayment of tax refund	R 37-38	R 37-38	R 38
8	Decision of Supreme Court of State of Florida	R 42	R 42	R 42-43
A	New York Life Insurance Company Policy on life of Herbert F. Underwood....	R 53	R 53	R 54
B	Letter of U.S. Treasury De- partment dated January 31, 1955, allowing Claims for Refund	R 54	R 54	R 54

Appendix B

OPINION OF THE SUPREME COURT OF FLORIDA

In the Supreme Court of Florida
January Term, A.D. 1953
Special Division A.

Bertha M. Underwood,	Appellant,	Case No. 23,659
vs.		
Herbert F. Underwood,	Appellee.	

Opinion filed April 10, 1953

An Appeal from the Circuit Court for Duval County,
DeWitt T. Gray, Judge.

Goldstein & Goldstein and S. William Goldstein, for
Appellant.

E. K. McIlrath, for Appellee.

Drew, J.:

On September 11, 1945, after more than 24 years of married life as the wife of Herbert F. Underwood, Bertha M. Underwood filed a complaint for divorce in the Circuit Court of Duval County. At the time of the institution of the suit they had one child, a boy, of the age of 19 years.

The record shows that the defendant husband filed his answer on the following day, along with a "waiver", a Master was appointed, testimony was taken on the same day, and on the following day a final decree of divorce was rendered by the Chancellor.

Attached to the Master's report was the following exhibit:

"Separation Agreement

"This Agreement made between Herbert F. Underwood, residing in Jacksonville, Duval County, State of Florida, (hereinafter referred to as the 'Husband'), and Bertha M. Underwood, residing in Jacksonville, Duval County, State of Florida (hereinafter referred to as the 'Wife'),

Witnesseth:

"That Whereas, the parties were married on the 16th day of March, 1921, and there is one child of the marriage, towit: Herbert Lee Underwood, now aged 19 years; and

Whereas, in consequence of disputes and unhappy differences, the parties have technically separated and are now and for sometime have not been living as husband and wife, and, since their technical separation, have agreed to live separate and apart; and

Whereas, the parties hereto each recognize the fact that it would be to the financial detriment of

each to become involved in a prolonged Court action concerning financial arrangements to be made between the parties and, therefore, desire to stipulate concerning such arrangement:

Now, Therefore, in Consideration of the Premises and of the mutual promises and undertaking herein contained and for other valuable considerations, the parties agree as follows:

1. The parties may and shall at all times hereafter live and continue to live separate and apart. Each shall be free from interference, authority and control, direct or indirect, by the other as if sole and unmarried.

2. As and for alimony and in full and complete satisfaction of the husband's obligation to maintain and support the wife, the husband agrees to pay, or to cause to be paid, to the wife, commencing as of the 15th day of September, 1945, the sum of Two Hundred Fifty Dollars (\$250.00) per month, payable One Hundred Twenty-Five Dollars (\$125.00) on the 15th day of September, 1945, and Two Hundred Fifty Dollars (\$250.00) on the 1st day of October, 1945, and a like amount of Two Hundred Fifty Dollars (\$250.00) on the 1st day of each and every month thereafter as hereinafter provided, as and for the alimony and support of the wife for and during the remainder of her life. If the husband shall die before the wife, the said monthly payments shall not cease but the payment thereof shall be a first charge and lien against the estate

of the husband, subordinate only to the expenses of his last illness and funeral expenses. It is expressly understood and agreed that said monthly payments of alimony shall not cease if a divorce is subsequently granted between the parties hereto and if, thereafter, the wife remarries, but such monthly payments shall continue during the life of the wife without any diminution or cessation.

3. The husband has taken out an insurance policy on his life in the sum of Thirty Thousand Dollars (\$30,000.00) in The New York Life Insurance Company and had had issued to him by the said company Policy #20206884. The wife is the beneficiary named in the said policy and it is stipulated and agreed that she shall continue to be the beneficiary of the said policy, irrespective of what the marital status of the parties may be. If, however, a divorce should be granted to the parties hereto and the wife should subsequently remarry, it is stipulated and agreed that the wife shall be beneficiary under the same policy to the extent of Twenty Thousand Dollars (\$20,000.00) instead of the face of the policy in the amount of Thirty Thousand Dollars (\$30,000.00), if the husband shall desire such reduction and shall notify the New York Life Insurance Company and shall have the necessary endorsements made by the Company to effect such change. Such sum of Twenty Thousand Dollars (\$20,000.00) shall be paid before anything is paid to any other beneficiary.

4. Should the wife ever sue the husband for divorce the husband not being in default under the terms of the agreement, the wife agrees that the provisions contained in this agreement are fully satisfactory and that this agreement shall be presented to the Court for the inclusion of the terms hereof in any final decree of divorce as and for all of the wife's claim against the husband for her support. If the wife shall hereafter sue the husband for divorce, nothing herein contained nor any agreement made between the parties hereto, whether incorporated herein or not, shall preclude the husband from defending such suit for divorce as he shall see fit.

In Witness Whereof, the parties hereto have set their hands and seals, in duplicate originals, to this agreement on this 11th day of September, A. D. 1945.

Herbert F. Underwood (Seal)

Herbert F. Underwood

Bertha M. Underwood (Seal)

Bertha M. Underwood

Signed, sealed and delivered

in the presence of:

Paul E. Speh

T. R. Watson

As to Husband

Fred B. Noble

T. R. Watson

as to Wife."

According to Mrs. Underwood, her husband had been urging her to get a divorce for several months. They had talked about financial matters in the event a divorce was obtained and had finally entered into the agreement which we have just quoted in full. She testified at the hearing that it had been finally consummated and entered into on the preceding day (September 11th). She was then shown the agreement, whereupon the following colloquy took place (Question by Mrs. Underwood's counsel, Mr. Noble, except where otherwise noted):

“Q. I will ask you to look at that document and state *whether that is the agreement which you have arrived at?*

A. Yes.

Q. What?

A. Yes, that's it.

Q. Will you state whether or not this is Mr. Underwood's signature to the document?

A. Yes, it is.

Q. And you, of course, having been married to him since 1921, know his signature?

A. Definitely.

Q. And is that your signature?

A. Yes, it is.

Q. *And is it your wish to have this introduced in evidence in this case as evidence as to what you have arrived at as to property rights?*

A. Yes.

Mr. Noble. We would like to offer this in evidence.

Mr. Speh. I would like to ask her a few questions?

Mr. Noble. All right.

Cross-Examination

By Mr. Speh. Q. Now, Mrs. Underwood, you understand that under the terms and provisions of this agreement that you will get from Mr. Underwood *only these provisions that are incorporated herein*, and that as far as *making any further provision for you that he isn't obligated to do so?*

A. Yes, sir.

Q. *And you understand that if he were to remarry or anything like that he would be free to do as he wished with his other property?*

A. Yes.

Q. *Other than to take care of the provisions of this agreement?*

A. Yes.

Q. And the terms of it are satisfactory to you?

A. Yes.

Q. And they are clearly understood by you?

A. Yes." (Emphasis supplied).

The final decree, omitting the formal parts, is as follows:

"It Is Ordered, Adjudged and Decreed as follows:

1. That the bonds of matrimony heretofore existing between the plaintiff and defendant be, and they are hereby forever dissolved.

2. As and for temporary and permanent alimony and in full and complete satisfaction of the defendant's obligation to maintain and support the plaintiff, the defendant shall pay to-wit:

(a) One Hundred Twenty-Five Dollars (\$125.00) immediately, if the same has not heretofore been paid according to the stipulation between the parties which is in evidence herein.

(b) The sum of Two Hundred Fifty Dollars (\$250.00) each month in advance beginning October 1, 1945, as and for temporary and permanent alimony or support money of the plaintiff. *If the defendant shall die before the plaintiff, the said monthly payments shall not cease but the payment thereof shall be a first charge and lien against the estate of the defendant, subordinate only to the expenses of his last illness and funeral expenses.*

(c) The defendant shall, at all times, promptly pay the premiums and other obligations necessary to keep the same in force on life insurance policy #20206884 issued on the life of the defendant by The New York Life Insurance Company in the sum of Thirty Thousand Dollars (\$30,000.00) and shall continue the plaintiff as the beneficiary thereof as the same now provides; *provided, however, that if the plaintiff, shall, during the defendant's lifetime, remarry any one except the defendant, the plaintiff shall be the beneficiary under said policy to the principal amount of Twenty Thousand Dollars (\$20,000.00), instead of Thirty Thousand Dollars (\$30,000.00), if the defendant shall desire such reduction and shall so notify The New York Life Insurance Company and shall have the necessary endorsements made by the Company to effect such change. Such sum of Twenty Thousand Dollars (\$20,000.00) shall be paid before anything is paid to any other beneficiary.*" (Emphasis supplied).

On May 2, 1947, by consent decree, the final decree above set forth was amended by deleting therefrom those portions of the decree which are italicized. On February 8, 1952, Herbert F. Underwood filed in said original cause a "Petition to Modify Alimony Decree." The petition set forth the decree of September 13, 1945, *supra*, and the amendment thereto of May 2, 1947, and then alleged that since the "entry of said decrees" the circumstances of the parties had changed in that: (1) Bertha had remarried; (2) that when the decrees were entered Bertha was not in good health but that she is now recovered; (3) that when the decrees were entered Bertha was unemployed but now has a job and is able to earn her own livelihood; (4) that since the entry of said decrees Bertha has inherited a large estate from Herbert's mother; (5) that Bertha obtained said estate because of undue influence practiced on Herbert's mother; (6) that since said decrees Bertha had vilified Herbert and "wickedly and willfully" tried to injure his business. The petition concludes with the statement that he is paid to date on the decrees and then prays that he be relieved of all further obligations under said decrees.

The wife answered the petition, moved to dismiss it and filed a petition praying the issuance of a rule to show cause directed to the husband for the purpose of enforcing the payments due the wife for the period subsequent to the date the petition for modification was filed.

The matter was heard by the lower Court on the above pleadings and certain interrogatories and an-

swers thereto (which do not appear on the record). The lower Court entered the decree now before us for review, the portions material to the disposition of the questions before us being as follows:

“It appears to the Court that on the 13th day of September, A.D. 1945, there was entered herein a certain Final Decree allowing the plaintiff, the former Mrs. Underwood, a Decree of Divorce against the defendant, Herbert F. Underwood, and also certain alimony, said alimony being described in paragraph 2 of said Decree. The stipulation attached to the Bill of Complaint merged in the Final Decree and the Court must look to the Final Decree for its construction and it is in the Final Decree that we find the whole obligation of the parties from the date of the Final Decree on, that is, from September 13, 1945 on.

“The Court further finds that in said Final Decree in the first lines of said paragraph 2, the alimony for the plaintiff is set forth and is so labeled:

‘As and for temporary and permanent alimony and in full and complete satisfaction of the defendant’s obligation to maintain and support the plaintiff, the defendant shall pay to the plaintiff the following amounts at the following times, to-wit:’

“And imposes upon the defendant, Herbert F. Underwood, an obligation of temporary and permanent alimony and in full and complete satisfaction of his obligation to support the plaintiff. That the sub-paragraphs following paragraph 2 labeled (a), (b) and (c) are limited by the label contained in the heading of paragraph 2, viz.:
Alimony

“It further appears and the Court so finds that on May 2, 1947, there was by consent of the parties filed herein a certain document known as Amendments to Final Decree, which was in the nature of a Final Decree, so that in fact the alimony provisions of said Final Decree, as amended by the Amendments to Final Decree, literally read as follows:

‘2. As and for temporary and permanent alimony and in full and complete satisfaction of the defendant’s obligation to maintain and support the plaintiff, the defendant shall pay to the plaintiff the following amounts at the following times, to-wit:

‘(a) One Hundred Twenty-five Dollars (\$125.00) immediately, if the same has not heretofore been paid, according to the stipulation between the parties which is in evidence herein.

‘(b) The sum of Two Hundred Fifty Dollars (\$250.00) each month in advance, beginning October 1, 1945, as and for temporary and permanent alimony or support money of the plaintiff.

‘(c) The defendant shall, at all times, promptly pay the premiums and all other obligations necessary to keep the same in force on life insurance policy #20206884 issued on the life of the defendant by The New York Life Insurance Company in the sum of Thirty Thousand Dollars (\$30,000.00) and shall continue the plaintiff as the beneficiary thereof as the same now provides;’

“Since it is admitted in the pleadings and by counsel that since and prior to the month of February, 1952, the former Mrs. Underwood has re-

married one other than the defendant, her former husband, Herbert F. Underwood, it seems to the Court that the act of remarriage itself without other or further order of Court should relieve the defendant, Herbert F. Underwood, from paying any further alimony whatsoever. It does not comport with public policy nor should it that a divorced wife should live with a new husband whose duty it is to support her and while at the same time she collects support from a previous husband. This Court, however, does not intend by this statement to infer that the defendant is entitled to recover back any payments of alimony made by him after his former wife's remarried (sic) and before the time of the filing of the Petition to Modify herein but specifically hold that he is not entitled to recover any such back payments.

“It appears further that the provisions of the insurance arrangement in sub-paragraph (c) of the Final Decree as amended by sub-paragraph (c) of the Amendments to Final Decree were in themselves of the nature of alimony just as were the provisions of sub-paragraph (b).

“It further appears to the Court that all provisions of the original stipulation between the parties, provisions of the Final Decree with respect to alimony all were merged in the Amendments to Final Decree made May 2, 1947.

“The plaintiff, Bertha M. Soltermann, the former Mrs. Underwood, having remarried prior to the month of February, 1952, and there being no other impediment, children or otherwise, to the exercise by this Court of its judicial discretion with respect to continuing said alimony, it is thereupon considered

“* * * that the plaintiff’s Motion to Dismiss the Petition for Modification of Decree contained in her First Defense be and the same is hereby denied, that the plaintiff’s Petition for Rule to Show Cause be and the same is hereby denied, that the defendant, Herbert F. Underwood, be and he is hereby required to pay to the former Mrs. Underwood, the plaintiff, Bertha M. Soltermann, or to her solicitors of record, the aforesaid sum of \$296.10 together with interest thereon at the rate of 6% per annum from April 30, 1951, said payment to be made within 10 days hereof and to be made at the office of said plaintiff’s solicitors of record, 914 Graham Building, Jacksonville, Florida, and that the defendant, Herbert F. Underwood, be and he is hereby released and relieved of and from all further obligation to pay alimony to the plaintiff herein, including that provided by sub-paragraph (b) as well as sub-paragraph (c) of said Final Decree of September 13, 1945, as modified by Amendments to Final Decree of May 2, 1947, and that said Decree, viz.: said Final Decree, as amended by said Amendments to Final Decree be and the same is hereby Amended accordingly and that this Decree of Modification is to take effect as of and with the month of February, 1952.

“It is further Ordered, Adjudged and Decreed that said Final Decree of September 13, 1945, as amended by Amendments to Final Decree of May 2, 1947, shall have no further operation, force and effect on and with respect to the aforesaid life insurance policy, being #20206884 of The New York Life Insurance Company on the life of Herbert F. Underwood, and that said policy be and it is hereby exonerated, released and dis-

charged of and from the operation, force and effect of this suit and of each and every Decree heretofore entered herein.”

The underlying basic error committed by the lower Court was his conclusion that “the stipulation attached to the Bill of Complaint merged in the final decree and the Court must look to the final decree for its construction and it is in the final decree that we find the whole obligation of the parties * * *”. That conclusion is unwarranted, erroneous and plainly does violence to the very clear and definite agreement of the parties appearing in the “Separation Agreement” which is referred to as a *stipulation*. The lower Court has constructed on this underlying and basic error another error, viz., that the payments owed by the husband to the wife are *alimony* and therefore governed by the decisions relating to the payments of alimony to a wife after her remarriage. While this is ordinarily true where the payment of true alimony is involved, even this rule is not without exceptions. 17 Am. Jur. 474, par. 610. In the paragraph above mentioned we find the statement: “Where an allowance is decreed to a divorced wife as a substitute for, or in lieu of, her rights in the husband’s property * * * it seems that the allowance is not affected by her remarriage.”

The Court has repeatedly held, along with practically every other court in the land, that property settlements between husband and wife made in good faith are valid and legal and should not be disturbed by the courts. *Vance v. Vance*, 143 Fla. 513, 197 So. 128. That

these agreements should be construed and interpreted as other contracts is no longer open to question. *Bergman v. Bergman*, 145 Fla. 10, 199 So. 920. We said in the case of *St. Lucie County Bk. & Tr. Co. v. Aylin, et al.*, 94 Fla. 528, 114 So. 438:

“... In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and *from a consideration of the surrounding circumstances, the occasion, and apparent object of the parties, to determine the meaning and intent of the language employed. Indeed, the great object and practically the only foundation of rules for the construction of contracts is to arrive at the intention of the parties.* This is a most conspicuous and far-reaching rule, and involves the nature of the instrument, the condition of the parties, and the objects which they had in view, and, *when the intent is thus ascertained, it is to be effectuated, unless forbidden by law.* ‘Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish.’ ” (Emphasis supplied)

The agreement of the parties is crystal clear. They had lived together nearly a quarter of a century and during that time had acquired some degree of wealth. The record clearly shows that at least for some time before the divorce the wife was working in the jewelry business of her husband. The undisputed testimony is that she had done as much, or more, of the buying than he had except for diamonds. How long she had been actively participating in the business does not

appear, but there can be no doubt that she had played a substantial part in helping acquire whatever wealth they possessed.

The fact that the divorce was awarded to the wife because of the conduct of the husband cannot be overlooked. For a long time the husband's attitude and conduct toward the wife had been such as to cause the wife mental and physical suffering. Her physician had told her “* * * if you continue at the rate you are going, you will not be able to take it very long.” During this period her husband was importuning her to get a divorce and finally the “financial arrangements” were worked out and agreed upon.

The primary and controlling question is whether the agreement constituted a property settlement, or whether the financial arrangements constituted alimony.

At the very outset we dispose of the legal effect of the use of the word “alimony” in the agreement and decree. It is not what it is *called* but what it *is* that fixes its legal status. It is the *substance* and not the *form* which is controlling. In the case of *International Trust Co. v. Liebhardt*, 111 Colo. 208, 139 Pac. 264, the Court held that the use of the word *alimony* was not conclusive and that it was substance and not form which guided the court. So far as agreements of the kind under consideration is concerned, where periodic payments are to be made the wife for the period of her life and is not limited to the joint lives of the parties, the legal effect of such payments are that they constitute property settlements and not alimony.

By its very nature, alimony is limited to the lifetime of the husband. See *Spear v. Spear*, 158 Md. 672, 149 Atl. 468 (from which we quote with approval in *Vance v. Vance*, supra); *Emerson v. Emerson*, 120 Md. 584, 87 Atl. 1033; *Newbold v. Newbold*, 133 Md. 170, 104 Atl. 366; *Dickey v. Dickey*, 154 Md. 675, 141 Atl. 387; *North v. North*, 339 Mo. 1226, 100 S. W. 2d 582.

The plain language of the agreement itself is wholly inconsistent with the idea that the financial arrangements are alimony. Not only did the agreement itself recite that each party recognized that “a prolonged court action concerning the financial matters” would be detrimental to both parties, but it specifically provided that such arrangements would be “in full and complete satisfaction of the husband’s obligation to maintain and support the wife”—and then continued that such payments should be for “*support of the wife during the remainder of her life.*” This language is clear enough, but just to make it doubly sure, the paragraph concluded with this provision:

“... It is expressly understood and agreed that the said monthly payments of alimony shall not cease if a divorce is subsequently granted between the parties hereto and if, thereafter the wife remarries, but such monthly payments shall continue during the life of the wife without any diminution or cessation.”

So far as the insurance policy is concerned, the agreement is just as specific—it not more so. It even contemplates that the wife will remarry and she agrees that in such event the husband may reduce the wife’s interest therein from \$30,000.00 to \$20,000.00.

We now turn our attention to the effect the two decrees had on the agreement.

We have heretofore quoted from the testimony of the wife concerning the agreement. She testified that the agreement set forth the understanding of the parties and constituted the agreement reached and that it was her wish to have it introduced in evidence as the agreement she and her husband had arrived at as to *property rights*. Her husband's attorney examined her about this agreement, and particularly admonished her that she would receive from her husband only those things provided for in the agreement and nothing else. (See the testimony heretofore quoted.) The final decree referred to the agreement in the following manner: "and having considered the stipulation of the parties heretofore made and which has been filed in evidence . . ." This decree did not supersede the agreement. There is nothing in the decree inconsistent with the agreement—so far as it goes. In fact, the language of the decree is almost verbatim the language of the agreement except that it omits that portion thereof which provides that the payments shall continue during the lifetime of the wife and the express provision quoted above concerning the event of the wife's remarriage. On this general subject we quote from 17 Am. Jur. 563, par. 736:

"As a general rule, provisions in the separation agreement for the support of the wife during life are not abrogated by a subsequent absolute divorce. Likewise, a provision in a separation agreement between husband and wife as to the making of payments to the wife for maintenance,

in terms operative until her remarriage, is not affected by a divorce obtained by the husband. *Nor has the court in awarding alimony any power to abrogate or modify such a provision without the consent of the parties*, although it has been held that a release thereof may be required by way of condition in the decree for alimony and that the amount of alimony awarded may be credited upon the amount due under the agreement where by implication from the stipulations of the parties in the divorce suit this clearly appears to have been their intention, especially where injustice would otherwise be accomplished. It has also been held that statutory authority to modify alimony awards does not warrant the vacation or modification of the terms of a separation agreement which terms have been incorporated in a subsequent decree of divorce. Where the agreement provided that it shall terminate on divorce, however, the court may disregard it in subsequent divorce proceedings.” (Emphasis supplied.)

The above paragraph has been supplemented by a new paragraph (see 1952 Cumulative Supplement to Vol. 17, page 138, Am. Jur.) which reads as follows:

“It has been held without exception that where a separation agreement provides for the continuance of payments to the wife after the death of the husband, the right of the wife to receive the payments after the husband’s death is not affected by an intervening divorce decree which either incorporates the former agreement or substantially provides for such payments in accordance therewith. In some cases the courts have

reached their conclusion that the right of a divorced wife to enforce a provision of a separation agreement for the continuance of payments after her former husband's death is not affected by an intervening divorce decree upon the theory that while 'alimony' ordinarily ceases upon the husband's death, the incorporation or embodiment in a divorce decree of a separation agreement providing for the continuance of payments during the life of the wife does not constitute such payments 'alimony', and they are therefore not subject to the rule that payments of alimony cease upon the husband's death." (Emphasis supplied.)

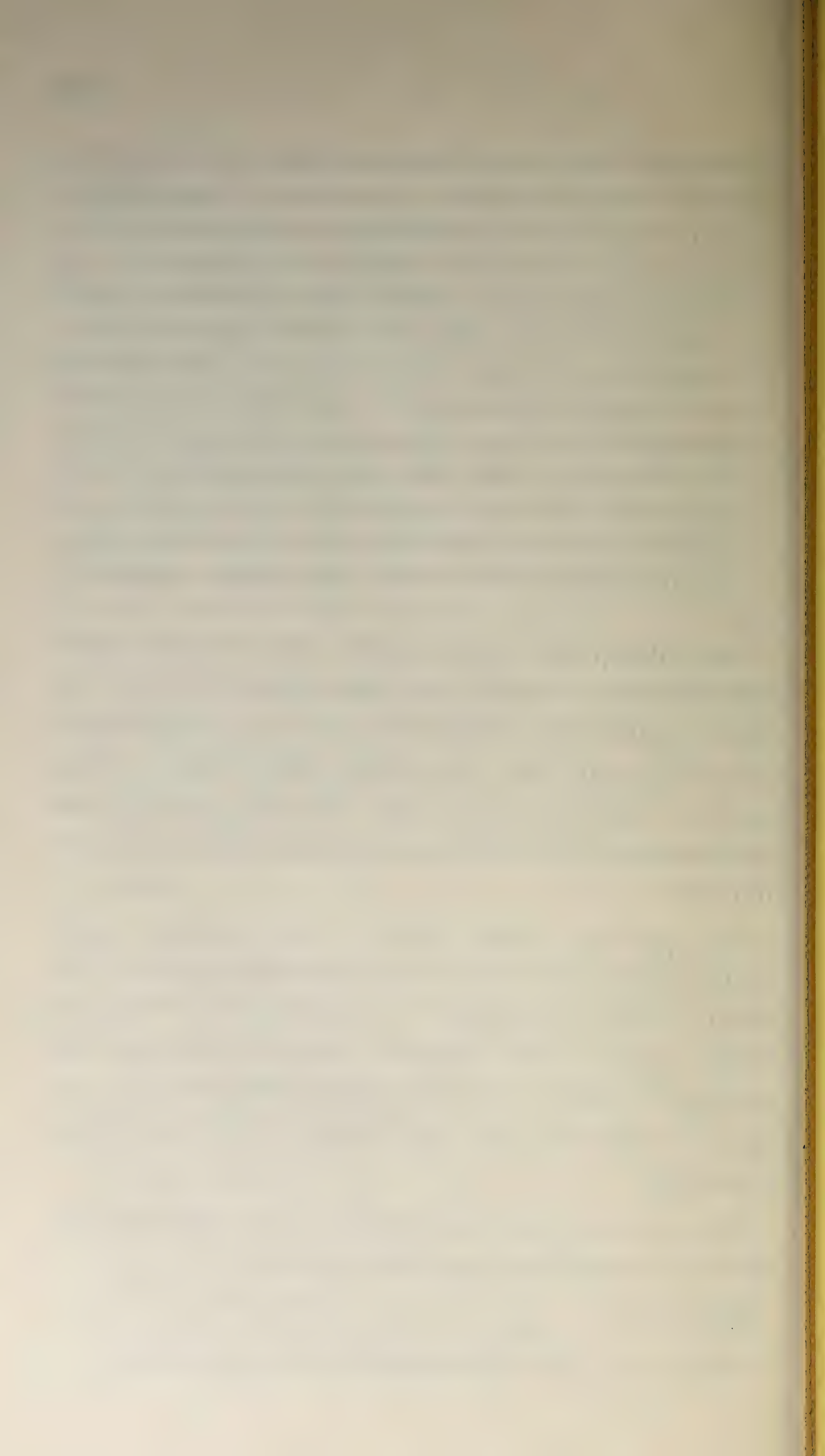
The subsequent decree merely cancelled the provision that the monthly payments should be a lien or charge against the husband's estate and, apparently, in exchange for such concession, took from the husband the right to reduce the insurance policy from \$30,000.00 to \$20,000.00 in the event of the wife's remarriage.

The question of the right of the husband under Section 65.15, F. S. A., to a modification of the provision of the separation is controlled by *Vance v. Vance*, supra. The appellee husband has made no showing of change of circumstances that would warrant overthrowing the provisions of the separation agreement.

The decree appealed from is hereby reversed for further proceedings consistent herewith.

Reversed.

Roberts, C., Terrell and Mathews, J. J., Concur.



No. 16,362

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BERTHA SOLTERMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE APPELLEE.

HOWARD A. HEFFRON,

Acting Assistant Attorney General.

LEE A. JACKSON,

FRED E. YOUNGMAN,

Attorneys, Department of Justice,

Washington 25, D. C.

LYNN J. GILLARD,

United States Attorney.

FILED

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IN THE

**United States Court of Appeals
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BERTHA SOLTERMANN,

Appellant,

VS.

UNITED STATES OF AMERICA,

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**On Appeal from the Judgment of the United States District Court
for the Northern District of California.**

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The memorandum opinion of the District Court (R. 10-13) is reported at 163 F. Supp. 397. The findings of fact and conclusions of law (R. 14-20) are not reported.

JURISDICTION.

This proceedings is based upon a complaint (R. 3-6) filed in the District Court for the Northern District of California, pursuant to Section 7405(b) of the Internal Revenue Code of 1954 for the recovery of an

amount alleged to have been erroneously refunded to Bertha Soltermann (herein sometimes referred to as the taxpayer) as an overpayment of income taxes for the years 1947 to 1951, both inclusive. The action was sanctioned and directed by the Attorney General of the United States, and authorized and requested by the Commissioner of Internal Revenue (R. 14), as provided by Section 7401 of the 1954 Code. Jurisdiction was conferred upon the District Court by 28 U.S.C., Section 1340, and Section 7402 of the Internal Revenue Code of 1954. The judgment of the District Court (R. 25-26) was entered September 4, 1958 (R. 68). Notice of appeal therefrom (R. 26-27) was filed by the taxpayer on October 31, 1958. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether, under the facts and the law, monthly support payments received by the taxpayer during the taxable years from her former husband pursuant to a separation agreement and the divorce decree, were properly held to be income of the taxpayer taxable to her under Section 22(k) of the Internal Revenue Code of 1939.

STATUTE INVOLVED.

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * *

(k) [As added by Sec. 120 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, etc., income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be

considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b).)

(26 U.S.C. 1952 ed., Sec. 22.)

STATEMENT.

The taxpayer's brief (pp. 2-4) contains only an abbreviated statement of the facts. Since the taxpayer challenges some of the District Court's findings (Br. 5-6), the material facts are here restated substantially as found by the District Court (R. 14-18).

The taxpayer formerly was the wife of Herbert Underwood from whom she was divorced by a decree

entered in the Circuit Court of Duval County, Florida, on September 13, 1945, which incorporated, by reference, a separation agreement between her and her husband, executed prior to the divorce decree, by the terms of which separation agreement the taxpayer was to receive payments of \$250 per month during her life, whether or not she and her then husband later were divorced and whether or not she thereafter remarried, the payments due the taxpayer being made a first charge and lien against the estate of her then husband, if he should predecease her; that as part of the separation agreement the taxpayer's then husband had taken out an insurance policy on his life in the sum of \$30,000 issued to him by the New York Life Insurance Company, of which the taxpayer was named beneficiary. The separation agreement termed the \$250 payments alimony. (R. 14-15.)

In 1952, after the taxpayer's remarriage, her former husband petitioned the Circuit Court of Duval County, Florida, to modify its decree, entered September 13, 1945, by releasing him from making any further payments, and the court modified the decree, releasing him from making any further payments, which it designated as "alimony," to the taxpayer. The taxpayer appealed the decision modifying the decree to the Supreme Court of Florida, which overruled the Circuit Court and ordered the payments, specifically adjudged to be payments for "property rights" or to represent "a property settlement" to be continued. (R. 15.)

On July 7, 1952, the taxpayer filed federal income tax returns for the years 1945 to 1951, inclusive, in

which she reported as taxable income payments received by her from her former husband and insurance premiums paid by him on the policy of which she was named beneficiary, and paid the income taxes reported thereon together with interest thereon as provided by law. The payments received by the taxpayer from her former husband were designated on the income tax returns as "alimony". (R. 16.)

On October 9, 1953, after the above decision of the Supreme Court of Florida, the taxpayer filed claims for refund of the taxes paid for the years 1945 to 1951, inclusive, on the above \$250 payments and insurance premiums, on the grounds that such payments and premiums were made to the taxpayer as part of a property settlement and were not taxable income to her. Those claims for refund were allowed by the Commissioner of Internal Revenue, and on or about February 25, 1955, and not earlier than that date, a check in the sum of \$985, which included interest of \$311 for the refunds claimed for the years 1945 and 1946, was issued to the taxpayer and duly paid. On or about March 10, 1955, and not earlier than that date, a check, in the sum of \$4,757.78, which included interest of \$866.57, for the refunds claimed for the years 1947 to 1951, inclusive, was issued to the taxpayer and duly paid. On February 5, 1957, the Bureau of Internal Revenue, by letter, demanded that the aforesaid refund be returned. (R. 16-17.)

In 1945, at the time of the taxpayer's divorce, her ex-husband operated a retail jewelry store in Jacksonville, Florida, and this store was conducted by the

husband as a sole proprietor. At the time of the divorce neither the taxpayer nor her husband owned any stocks, bonds, real estate or other property other than the jewelry store. The taxpayer at no time during her marriage to her former husband made financial contributions to the above jewelry business, or any other business owned by her former husband, from her separate property. (R. 17.)

The taxpayer acquired no property during her former marriage by gift, bequest or devise, and at the time of her marriage to her former husband she owned no separate property. (R. 17.)

The taxpayer worked at the above mentioned jewelry store from time to time during her former marriage and received therefor compensation in salary which she used for joint living expenses. She at no time entered into any partnership agreement with her former husband during the term of their marriage with respect to any business owned or operated by him. (R. 17-18.)

Under and pursuant to the separation agreement of September 13, 1945, incident to the divorce proceedings between the taxpayer and her former husband, the taxpayer received, exclusive of payments for premiums of insurance, of the sum of \$1,000 for the last four months of 1945 and \$3,000 for each of the years 1946 to 1951, inclusive. (R. 18.)

The District Court also found that the determination by the Supreme Court of Florida that the payments made by the taxpayer's former husband under

the terms of the divorce decree and separation agreement were payments for her interest in her husband's business, in whole or in part, was not binding on the District Court since the United States was not a party to that litigation and the issue in the instant case is liability for federal income taxes. (R. 18.)¹

SUMMARY OF ARGUMENT.

Section 22(k) of the Internal Revenue Code of 1939 requires inclusion in the gross income of a divorced wife of periodic support (alimony) payments received from her former husband pursuant to the divorce decree or a written instrument incident to the divorce, while complementary Section 23(u) authorizes the husband to deduct such payments from his income. These sections, added to the Code in 1942, were designed to relieve the husband of the hardship of paying income tax on amounts expended for the support of his divorced wife, and to tax such payments instead to the recipient wife. As appears from their legislative history, Congress sought to insure uniform tax treatment of alimony payments, irrespective of state law variations as to the husband's continuing obligation to support.

¹The District Court also made findings and conclusions with respect to the taxability of the payments made under the separation agreement for premiums on the life insurance policy of which the taxpayer was beneficiary. It decided this issue in favor of the taxpayer and no appeal was taken by the Government. Hence, such payments are not in issue here. (R. 18-20.)

The \$250 monthly payments which the taxpayer-wife received during the taxable years (1947-1951) clearly constituted support payments falling within the terms of Section 22(k), were properly reported by her as such in her returns, and were properly held to be such by the court below. The payments were "periodic" (monthly), as distinguished from installment payments of a principal sum; they were made to a wife "who is divorced * * * from her husband under a decree of divorce"; they were received by her "subsequent to such decree"; they were made "in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband" under the decree; and the prior separation agreement pursuant to which the payments were made was "incident to", and indeed was substantially incorporated in, the divorce decree.

Whether payments received by a divorced wife from her former husband fall within the purview of Section 22(k) depends, of course, on their true nature, not on the labels employed to describe them. The District Court properly rejected taxpayer's contention that the payments here in question were received in settlement of property rights rather than in discharge of the husband's continuing obligation to support. The contention runs squarely counter to the plain terms of both the separation agreement and the divorce decree, which expressly refer to the payments as "alimony" and "support" payments. Moreover, as the record shows and the District Court found, the wife had no separate property and the payments were in-

tended to be in discharge of the husband's obligation to support, not by way of a property division. In fact, the payments were so treated by taxpayer in her returns. The state court decree upon which taxpayer relies, was entered after the taxable years here involved and after the payments in question were made; and it is not inconsistent with, nor does it even purport to revoke, the alimony provisions of the separation agreement and divorce decree. In any event, it could not retroactively alter the true character of the payments for federal income tax purposes. Even assuming *arguendo* that the separation agreement and the decree settled property rights as between taxpayer and her former husband, it is clear—as the agreement itself shows and the court below found—that they *also* imposed upon the husband a continuing obligation to support, an obligation which was discharged during the taxable years by the periodic support payments in question. The court below was, therefore, fully justified in holding that the payments fell within and were taxable to the wife under Section 22(k).

ARGUMENT.

THE DISTRICT COURT DID NOT ERR IN HOLDING, UNDER THE FACTS AND THE LAW, THAT SUPPORT PAYMENTS MADE TO THE TAXPAYER BY HER FORMER HUSBAND PURSUANT TO THEIR SEPARATION AGREEMENT WERE "PERIODIC PAYMENTS" TAXABLE AS INCOME TO HER UNDER SECTION 22(k) OF THE INTERNAL REVENUE CODE OF 1939.

The monthly payments here involved were received by the taxpayer from her former husband pursuant to a written agreement entered into just prior to, and in

contemplation of, divorce, the written instrument, entitled "Separation Agreement"², providing, with respect to the payments here involved, that—

2. As and for alimony and in full and complete satisfaction of the husband's obligation to maintain and support the wife, the husband agrees to pay, or to cause to be paid, to the wife, commencing as of the 15th day of September, 1945, the sum of Two Hundred Fifty Dollars (\$250.00) per month, payable One Hundred Twenty-five Dollars (\$125.00) on the 15th day of September, 1945, and Two Hundred Fifty Dollars (\$250.00) on the 1st day of October, 1945, and a like amount of Two Hundred Fifty Dollars (\$250.00) on the 1st day of each and every month thereafter as hereinafter provided, *as and for the alimony and support of the wife for and during the remainder of her life*. If the husband shall die before the wife, the said monthly payments shall not cease but the payment thereof shall be a first charge and lien against the estate of the husband, subordinate only to the expenses of his last illness and funeral expenses. It is expressly understood and agreed that the said monthly payments *of alimony* shall not cease if a divorce is subsequently granted between the parties hereto and if, thereafter, the wife remarries, but such monthly payments shall continue during the life of the wife without any diminution or cessation.

* * *

4. Should the wife ever sue the husband for divorce, the husband not being in default under

²Exhibit 1, R. 33. By stipulation of the parties (R. 73), it was agreed that exhibits designated on appeal in this action may be considered in their original form without printing.

the terms of the agreement, the wife agrees that the provisions contained in this agreement are fully satisfactory and that this agreement shall be presented to the Court for the inclusion of the terms hereof in any final decree of divorce *as and for all of the wife's claim against the husband for her support*. If the wife shall hereafter sue the husband for divorce, nothing herein contained nor any agreement made between the parties hereto, whether incorporated herein or not, shall preclude the husband from defending such suit for divorce as he shall see fit. (Italics supplied.)

The decree of divorce,³ entered the day after execution of the above "Separation Agreement", provided, with respect to the payments here involved, that—

2. *As and for temporary and permanent alimony and in full and complete satisfaction of the defendant's obligation to maintain and support the plaintiff*, the defendant shall pay to the plaintiff the following amounts at the following times, to-wit:

(a) One Hundred Twenty-Five Dollars (\$125.00) immediately, if the same has not heretofore been paid according to the stipulation between the parties which is in evidence herein.

(b) The sum of Two Hundred Fifty Dollars (\$250.00) each month in advance, beginning October 1, 1945, *as and for temporary and permanent alimony or support money of the plaintiff*. If the defendant shall die before the plaintiff, the said monthly payments shall not cease but the payment thereof shall be a first charge and lien

³Exhibit 2, R. 34.

against the estate of the defendant, subordinate only to the expenses of his last illness and funeral expenses. (*Italics supplied.*)⁴

The District Court concluded as a matter of law (R. 20) that—

4. The monthly payments made to the defendant by her former husband were made in discharge of a legal obligation which because of the marital or family relationship was imposed upon or incurred by the husband under a decree or [“or” misprinted “of” in the record, p. 20] written instrument incident to the divorce proceedings between the defendant and her former husband and are taxable to her under Section 22(k) of the 1939 Code.

The section relied upon (Section 22(k) of the 1939 Code, *supra*), so far as material here, provides:⁵

In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or separate maintenance, *periodic payments* (whether or not made at regular intervals) received subsequent to such decree in discharge of * * * a legal obligation which, because of the marital or family relationship, is * * * incurred by such husband * * * under a written instrument incident to such divorce * * * shall be includible in the gross income of such wife * * *. (*Italics supplied.*)

⁴The last sentence of this paragraph (b) was eliminated by an amendment to the final decree [Exhibit 3, R. 34] entered by the Circuit Court for Duval County, Florida, on May 2, 1947.

⁵Other provisions of Section 22(k), and Sections 23(u) and 171, added to the 1939 Code at the same time, are helpful in understanding the purpose of Congress in enacting the provision here involved.

The facts bring this case squarely within the above provisions of Section 22(k), and the District Court did not err in so holding. The taxpayer was divorced from her former husband; the payments in issue were "periodic payments" made to her by the former husband in discharge of a legal obligation which was incurred by him where he entered into the separation agreement of September 12, 1945; the obligation clearly was incurred because of the marital or family relationship; and the obligation was also made binding by the divorce decree of September 13, 1945, incorporating therein the provisions of the separation agreement.

The taxpayer seeks a reversal of the District Court's judgment on the ground, as we understand from her statement of questions involved (Br. 4-5), specification of errors (Br. 5-6), and argument on the merits (Br. 13-24), that the payments received by her pursuant to the separation agreement and divorce decree were not payments of the character includible in her gross income under Section 22(k), because they were payments made in settlement of property rights which she now claims she had in the sole proprietorship business conducted by her former husband during their marriage and at the time of their divorce, and as such are not includible in her gross income. We submit there is no merit to the taxpayer's contentions.

Taxpayer's argument is prefaced with a contention (Br. 10-13) to the effect that this action having been brought by the United States to recover from the taxpayer amounts alleged to have been erroneously re-

funded to her as overpayments of income tax, the burden of proof is upon the Government, and it has failed to bear that burden.

Even assuming that the initial burden of proof is upon the Government in this kind of a suit, we submit this argument is without merit. It is based upon the contention, not established by the evidence, and not supported by any finding by the District Court, that the so-called "Separation Agreement" of September 12, 1945, was something other than what it purported on its face to be, i.e., that it was in fact nothing more than a property settlement. To this end, and in an effort to attribute to the District Court a conclusion that only a property settlement was involved, taxpayer quotes certain excerpts (Br. 11), from the District Court's opinion. However, a reading of the opinion as a whole (R. 10-13), discloses that these excerpts referred to contentions of the taxpayer which did not alter the court's conclusion (R. 13) that—

Be that as it may, the transaction viewed as a whole indicates the agreement was entered into with a view on the part of both the defendant and former husband of discharging the husband's legal obligation imposed by the marital relationship and as such falls within the provisions of Section 22(k) of Title 26, U.S.C.A.

Moreover, the District Court already had pointed out in its opinion (R. 12) that—

Conceding that the obligation incurred and imposed by the agreement and decree settled and disposed of property right as between the defendant and her former husband, it appears clear to

the court from the evidence that the obligation was also “in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband.”

The District Court’s view of the transaction as a whole is fully supported by the literal and unambiguous language of the so-called “Separation Agreement”. By that agreement the husband, “As and for alimony and in full and complete satisfaction of the husband’s obligation to maintain and support his wife”, agreed to pay to the taxpayer \$250 a month “as and for the alimony and support of the wife for and during the remainder of her life”; and it was further agreed that should the wife ever sue the husband for a divorce she would accept the agreement as fully satisfactory and present it to the court, which she did, for inclusion of the terms thereof in the final divorce decree “as and for all of the wife’s claim against the husband for her support”.

The agreement as a whole is entirely consistent with the above quoted language. It not only repeatedly emphasizes that the husband thereby obligates himself to pay \$250 monthly to the taxpayer in discharge of obligations imposed upon him by the marital relationship, but negates any idea that such payments, or any part thereof, were being made in connection with any sort of property settlement. Thus, the Government more than fully met its burden of proving a *prima facie* case that the periodic payments in issue were includible in the taxpayer’s income under Section 22(k), and any further proof rests with the taxpayer.

Despite the clear, unambiguous language of their separation agreement and divorce decree, and the fact that she had from the beginning reported and paid tax on the periodic payments received from her former husband, the taxpayer would now have this Court hold that the payments in issue were payments made on a property settlement, relying upon her own uncorroborated testimony (R. 29-65) and upon a decision of the Supreme Court of Florida⁶ disposing of the former husband's "Petition to Modify Alimony Decree", filed on February 8, 1952, after the wife had remarried and *after the taxable years here involved*, in which, on the basis of various allegations, the former husband asked, among other things, to be relieved of all further obligation for support payments under the final divorce decree and amendment thereto. (Appendix B, p. x.) The relief prayed for was granted by the lower court (Appendix B, pp. x-xv), but was denied by the Florida Supreme Court (Appendix B, pp. xv-xxi).

The short answer to this argument is that neither the uncorroborated testimony of the taxpayer nor the decision of Florida Supreme Court in any way changes the fact that the payments here in issue were "periodic payments" taxable to the wife under Section 22(k). The uncorroborated testimony of the tax-

⁶*Underwood v. Underwood*, 64 S. 2d 281, reproduced as Appendix B to the taxpayer's brief herein. References herein to the opinion in that case will be to such Appendix B rather than to the official report.

payer⁷ is summarized in her brief (p. 16) as evidence that the payments in issue were made in settlement for her eighteen years of service in the business (R. 43); that there never was any alimony (R. 45); that the separation agreement was a property settlement; and that her husband could not pay her a lump sum at the time of the divorce, so she agreed to the monthly payments of \$250 (R. 47). Further reliance (Br. 16) also is placed upon the taxpayer's own testimony (R. 48, 49, 59-61) as establishing that the taxpayer knew no attorney at the time of the contemplated divorce action; that her husband chose her attorney and that the attorney drew the agreement after one conference with both parties; that the taxpayer never consulted her attorney alone at any time; and that her husband did not even bring his own attorney to the conference with the taxpayer and her attorney, apparently feeling he did not need other counsel.

This kind of testimony, uncorroborated and self serving though it may be, very well could elicit from an interested and sympathetic court statements such as those quoted (Br. 11) from the opinion below (R. 12). However, even if this case were one in which, and the parties and the terms of the written agreement were such that, oral testimony would be admissible to vary the terms of a written agreement, the taxpayer's testimony here could not be accepted as con-

⁷There seems to be considerable variance, unimportant here, between some of taxpayer's testimony (R. 29-65), and statements in the opinion of the Florida Supreme Court (Appendix B to taxpayer's brief).

vincing evidence that a property settlement had purposely been couched in such language.⁸ Despite taxpayer's analysis (Br. 16), the evidence is that at the time of the separation agreement the husband operated, as a sole proprietorship, a retail jewelry business to which the taxpayer had contributed her services over the period of their married life. That is the extent of the affirmative evidence so far as any property rights or property settlement is concerned. Lacking entirely is any evidence as to the extensiveness or value of that business, its income productivity, any understanding of the parties as to its real ownership, or relative or other value of services contributed by either husband or wife. More significant, however, is the complete absence of any evidence, other than the taxpayer's vague and unconvincing testimony, that any part of the periodic monthly payments were intended to compensate the taxpayer for an interest in property of any kind. The absence of any reference to her property interest, assuming it was worth mentioning, and the fact that the payments to the wife were to be made for life, rather than for any specified period that would permit some slight assumption in her favor,

⁸Even if this testimony could warrant a conclusion that the periodic payments were, in part, a settlement of property rights, since the burden is upon the taxpayer to overcome the *prima facie* case established by the Government's evidence, it would follow that the burden of proving *what part* would fall upon the taxpayer. Hence, the taxpayer's assumption concerning the burden of proof (Br. 10-13) has been misplaced, and *Thorsness v. United States*, 260 F. 2d 341 (C.A. 7th), cited by the taxpayer (Br. 12), becomes authority for affirming the District Court's decision herein.

negative any idea that the payments were intended to any extent as a property settlement. Compare *Myers v. Commissioner*, 212 F. 2d 448 (C. A. 4th), and cases cited; *Davidson v. Commissioner*, 219 F. 2d 147 (C. A. 9th).

Likewise, the decision of the Supreme Court of Florida in *Underwood v. Underwood*, 64 S. 2d 281, affords no basis for reversing the judgment of the District Court in the instant case. See *Daine v. Commissioner*, 168 F. 2d 449 (C. A. 2d); *Van Vlaanderen v. Commissioner*, 175 F. 2d 389 (C. A. 3d). In that case, according to the Florida Supreme Court's opinion, the taxpayer's husband had filed in the original divorce proceeding a document entitled "Petition to Modify Alimony Decree" in which, on grounds stated therein, he sought release from those obligations of the divorce decree based on the so-called "Separation Agreement" (Appendix B, p. x), and the Circuit Court of Duval County granted the relief (Appendix B, pp. xi-xv). The Florida Supreme Court reversed the lower court, not on any finding that the "Separation Agreement" was a property settlement but on abstract principles of law which are not applicable here. In reversing the lower court the Supreme Court said (Appendix B, p. xv):

The underlying basic error committed by the lower Court was his conclusion that "the stipulation attached to the Bill of Complaint merged in the final decree and the Court must look to the final decree for its construction and it is in the final decree that we find the whole obligation of the parties * * *". That conclusion is unwar-

ranted, erroneous and plainly does violence to the very clear and definite agreement of the parties appearing in the "Separation Agreement" which is referred to as a *stipulation*. The lower Court has constructed on this underlying and basic error another error, viz., that the payments owed by the husband to the wife are *alimony* and therefore governed by the decisions relating to the payments of alimony to a wife after her remarriage. While this is ordinarily true where the payment of true alimony is involved, even this rule is not without exceptions.

Without elaborating upon exceptions to the rule "where the payment of true alimony is involved", the Court then proceeded to a consideration of the validity of the "Separation Agreement", emphasizing the "whereas" clauses and the provision that monthly payments should not cease if a divorce were subsequently granted and the wife thereafter remarried (Appendix B, p. xvii); and on the basis that the parties "had lived together nearly a quarter of a century and during that time had acquired *some degree of wealth*"; "that at least for some time before the divorce the wife was working in the jewelry business of her husband"; "that she had done as much, or more, of the buying than he had except for diamonds"; and that "there can be no doubt that she had played a substantial part in helping acquire *whatever wealth they had possessed*" (Appendix B, pp. xvi-xvii, Italics supplied), held the separation agreement binding on the husband on the abstract legal proposition that (Appendix B, p. xvii)—

So far as agreements of the kind under consideration is concerned, where periodic payments are to be made to the wife for the period of her life and is not limited to the joint lives of the parties, *the legal effect of such payments are that they constitute property settlements and not alimony.* (Italics supplied.)

Whether the “Separation Agreement” was properly upheld on that ground, or whether it should have been upheld on some other ground, is quite immaterial so far as the issue involved in the present proceeding is concerned. That proceeding did not involve or determine any property rights of the taxpayer—except to the extent that her contractual right to receive periodic monthly payments under that agreement *after* her remarriage may be considered a property right.⁹ It merely determined that under the separation agreement she had entered into with her former husband she was entitled to continue receiving periodic monthly payments of \$250 after her remarriage. It did not—and could not—determine the issue involved in the instant proceeding, which is whether the periodic monthly payments received under that agreement (here before remarriage) are includible in the taxpayer’s gross income under Section 22(k) of the 1939 Code. Moreover, as the District Court properly pointed out (R. 11-12), the United States was neither

⁹For this reason, the several cases relied upon by the taxpayer (Br. 18-22) for the proposition that state law controls in determining property rights and state court decisions determining such rights are binding on the federal courts have no application here, and it would serve no useful purpose to enter into a detailed review of the issues involved in those cases.

a party to the agreement between those individuals, nor a party to the litigation in the state courts, and may not be bound by the decision of the Florida Supreme Court. See *Daine v. Commissioner, supra*; *Van Vlaanderen v. Commissioner, supra*. Since the present issue is one of federal taxation—application of a federal statute to the facts of the particular case—we fail to see how the state court’s adjudication of the rights of the parties under their agreement can affect the issue before this Court. *Daine v. Commissioner, supra*, p. 451. To the extent that a state court decision represents an adjudication of the rights of the parties under state law, the general rule is that federal law controls in the taxation of those rights. As the Supreme Court said in *Burnet v. Harmel*, 287 U.S. 103, 110:

Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. [Citations.] State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. [Citations.]

And in *Lyeth v. Hoey*, 305 U.S. 188, which involved rights established by a state court decree, the Supreme Court again said (p. 194):

In dealing with the meaning and application of an act of Congress in the exercise of its plenary power under the Constitution to tax income and grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted "so as to give a uniform application to a nationwide scheme of taxation." *Burnet v. Harmel*, 287 U.S. 103, 110. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation depend upon state law. [Citations.]

See, also, *United States v. Pelzer*, 312 U.S. 399, *Watson v. Commissioner*, 345 U.S. 544, and *Daine v. Commissioner*, *supra*.

Of primary importance here is the coverage of Section 22(k) of the 1939 Code, providing for inclusion in gross income of a wife who is divorced or legally separated from her husband of "periodic payments" received by her subsequent to the decree of divorce or separation "in discharge of * * * a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband" under such decree or "under a written instrument incident to such divorce or separation". That section was added to the 1939 Code by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, along with Section 23(u) of the 1939 Code (added by Section 120(b) of the 1942 Act, *supra*), relating to deductibility by the husband from his gross income of such payments, and

Section 171 of the 1939 Code (added by Section 120 (c) of the 1942 Act, *supra*), relating to the taxation to the recipient of income of an estate or trust payable to a divorced or legally separated wife.

The scope and application of the new provisions of the 1939 Code were explained in considerable detail by the respective Congressional Committees concerned with their enactment. See H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 71-74 (1942 Cum. Bull. 372, 427-429); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83-87 (1942-2 Cum. Bull. 504, 568-570).¹⁰ These additions, and related amendments to other provisions of the 1939 Code, were explained (H. Rep. No. 2333, *supra*, pp. 71-72)¹¹ as being made "in order to provide in certain cases a new income tax treatment for payments in the nature of or in lieu of alimony or an allowance for support as between divorced or legally separated spouses," and—

These amendments are intended to treat such payments as income to the spouse actually receiving or actually entitled to receive them and to relieve the other spouse from the tax burden upon whatever part of the amount of such payments is under the present law includible in his gross income. In addition, the amended sections will produce uniformity in the treatment of amounts paid in the nature of or in lieu of alimony *regardless of*

¹⁰See, also, Treasury Regulations 111, Section 29.22(k)-1, under the 1939 Code, applicable to years beginning after December 31, 1941, and Treasury Regulations 118, Section 39.22(k)-1, under the 1939 Code, applicable to years beginning after December 31, 1951.

¹¹See, also, S. Rep. No. 1631, *supra*, p. 83.

variance in the laws of different States concerning the existence and continuance of an obligation to pay alimony. (Italics supplied.)

The treatment of such payments under prior laws, while not important here, is illustrated by the Supreme Court's decisions in *Gould v. Gould*, 245 U.S. 151, holding that alimony payments are not income of the wife, and in *Douglas v. Willcuts*, 296 U.S. 1, and *Helvering v. Fitch*, 309 U.S. 149, holding that the income of an alimony trust is taxable to the husband. See, also, *Daggett v. Commissioner*, 128 F. 2d 568 (C. A. 9th), certiorari denied, 317 U.S. 673. The provisions enacted in 1942 providing a new income tax treatment for such payments naturally has led to much tax litigation, and this Court is thoroughly familiar with the problems involved. See, e.g., *Laughlin's Estate v. Commissioner*, 167 F. 2d 828 (C.A. 9th); *Commissioner v. Miller*, 199 F. 2d 597 (C.A. 9th); *Myers v. Commissioner*, 212 F. 2d 448 (C.A. 9th); *Davidson v. Commissioner*, 219 F. 2d 147 (C.A. 9th); *Fidler v. Commissioner*, 231 F. 2d 138 (C.A. 9th); *Hollander v. Commissioner*, 248 F. 2d 523 (C.A. 9th); *Eisinger v. Commissioner*, 250 F. 2d 303 (C.A. 9th), certiorari denied, 356 U.S. 913. See, also, *Brown v. United States*, 121 F. Supp. 106 (N.D. Calif.); *Guggenheim v. Riddell* (S.D. Calif.), decided May 18, 1958 (1 A.F.T.R. 2d 1799).

Every objection the taxpayer has made, or could make, to the decision of the District Court in this case is fully answered by the above decisions of this Court, and the citation of authorities from other jurisdictions

would be superfluous. Particularly, those cases make it clear that regardless of whether the "Separation Agreement" of September 12, 1945, may be characterized as a property settlement (the only contention made by the taxpayer on the merits), or not, the periodic monthly payments received by her under that agreement were clearly support payments includible in her gross income under Section 22(k). The agreements in *Laughlin's Estate v. Commissioner*, *supra*, *Commissioner v. Miller*, *supra*, and *Hollander v. Commissioner*, *supra*, certainly are as much in the nature of a property settlement as the "Separation Agreement" involved in the instant case. More specifically in point here, however, are *Myers v. Commissioner*, *supra*, and *Davidson v. Commissioner*, *supra*, both quite similar to the instant case in material respects, in which this Court emphasized the importance of designating a specific principal amount as representing a property settlement. As this Court said in *Laughlin's Estate v. Commissioner*, *supra*, p. 829:

It will be noted that the text of the statute makes no reference to "alimony" as such, nor to payments for support or maintenance, but seems to encompass all payments made under a decree of divorce or separation in discharge of a legal obligation imposed under a decree of divorce because of the marital relationship.

In *Commissioner v. Miller*, *supra*, endorsed by the Court of Appeals for the Third Circuit in *MacFadden v. Commissioner*, 250 F. 2d 545, this Court further pointed out (p. 599) that—

Section 22(k) was interpolated into the revenue laws in 1942. The apparent thought of Congress in enacting it was that the wife should, in fairness, be charged with and the husband allowed to deduct, for income tax purposes, the payments of the latter for alimony and for separate maintenance and support in the nature of or in lieu of alimony.

The facts of the instant case present it as one of the simplest and most appropriate which has come to our attention for the application of Section 22(k) and Section 23(u) of the 1939 Code. The taxpayer was divorced from her husband under a decree of divorce. The payments here involved were received by her subsequent to the decree of divorce in discharge of an obligation which, because of the marital or family relationship, was incurred by the former husband under a written instrument "incident to" such divorce. *Commissioner v. Miller, supra*, and cases cited, p. 527, fn. 10; *Hollander v. Commissioner, supra*; *MacFadden v. Commissioner, supra*. They were "periodic payments" within the meaning of the statute, not installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument. *Myers v. Commissioner, supra*, and cases cited, p. 450, fn. 2; *Davidson v. Commissioner, supra*. Compare *Fidler v. Commissioner, supra*. The decision of the Florida Supreme Court confirming the taxpayer's right to receive such periodic payments after her remarriage did not affect the true character of the payments here involved so far as the federal income tax laws are concerned.

CONCLUSION.

The decision of the District Court is right. It is supported by the facts and the law and should be affirmed.

Respectfully submitted,

HOWARD A. HEFFRON,

Acting Assistant Attorney General.

LEE A. JACKSON,

FRED E. YOUNGMAN,

Attorneys, Department of Justice,
Washington 25, D.C.

LYNN J. GILLARD,

United States Attorney.

July, 1959.

No. 16,362

United States Court of Appeals
For the Ninth Circuit

BERTHA SOLTERMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

APPELLANT'S REPLY BRIEF.

LEON SCHILLER,

CYRIL LOUIS WEEKS,

LANSBURGH, HOFFMAN & SCHILLER,

105 Montgomery Street, San Francisco 4, California,

Attorneys for Appellant.

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No. 16,362

**United States Court of Appeals
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BERTHA SOLTERMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

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**On Appeal from the Judgment of the United States District Court
for the Northern District of California.**

APPELLANT'S REPLY BRIEF.

**RESPONDENT'S CONTENTION THAT APPELLANT HAD NO
PROPERTY INTEREST IN THE FAMILY BUSINESS AND
FURTHER CONTENTION THAT THE PAYMENTS IN ISSUE
WERE SOLELY SUPPORT PAYMENTS IS CONTRARY TO THE
EVIDENCE AND THE FINDINGS OF FACT.**

Respondent informs this court that the only question presented by this appeal is whether the "support payments received by the taxpayer" were income (Br. 2). Respondent then cites many decisions to support the legal conclusion that support payments are taxable. We certainly agree with respondent that to the extent any payments here in issue were support payments, they would be taxable to appellant. How-

ever, respondent must totally ignore the findings of fact, the evidence, the decision of the Supreme Court of Florida in *Underwood v. Underwood*, as well as the general law of the State of Florida, in order to arrive at its erroneous conclusion that the payments here in issue were solely support payments.

Appellant stated in the opening brief that the trial court concluded that the payments in issue settled both property rights and the obligation to support and were therefore, in its opinion, fully taxable (Appellant's Opening Brief, pp. 10-13). Respondent has now told this court that the trial court found that the wife had no separate property and the payments in issue were solely support payments (Br. 9-10). We respectfully insist that respondent's contention completely misinforms this court. We challenge respondent to tell this court in which findings of fact the trial court determined that the payments were solely support payments or solely in discharge of a legal obligation arising from the marital obligation. We challenge respondent to tell this court in which findings of fact the trial court concluded that appellant had no property interest in the family business. The respondent cannot meet this challenge for a very plain and simple reason. Such findings do not exist.

The trial court found that the only property owned by appellant and her former husband was the family jewelry store (Finding of Fact No. 11, R. 17). The court found that appellant made no *financial* contribution to the business (Finding of Fact No. 12, R. 17). In this regard, appellant never claimed any financial

contribution to the business as the means whereby she acquired her interest in the family business, but relied solely upon her contribution of *services* to the business. What finding of fact did the trial court make on this key issue? If the trial judge believed that appellant made no contribution in services, he could have clearly said so. Instead, the trial court made the finding that:

“14. Defendant worked at the aforesaid jewelry store from time to time during her marriage with Mr. Underwood and received therefor compensation in salary which she used for joint living expenses.” (R. 17.)

This finding is inadequate and misleading, but even if we accept it, it can support only the legal conclusion that appellant contributed her services to the business. A so-called compensation which appellant used for the rent, food and clothing expenses of her husband and herself is not payment for services. Mr. Underwood was merely paying appellant household money and mislabeling the payment as “compensation,” just as he subsequently made payments for a property interest and mislabeled these payments as alimony. Mr. Underwood was required to furnish funds for rent, food and clothing for his wife and himself whether she worked in the business or not. Thus, obviously her services in the business were not compensation even under the finding made by the trial court.

We cited a number of Florida decisions setting forth the fundamental rule of law that in that state a wife who contributes industry and labor to a business

operated by her husband, acquires a property interest in that business (Appellants' Opening Brief, pp. 13-15). Respondent has accepted the fact that this is the law of Florida. Thus the finding made by the trial court, whatever the inadequacy of the finding from the appellant's view, establishes that a contribution of services was made and that the only proper legal conclusion to draw from the applicable Florida law is that appellant acquired an interest in the family business as a result of the contribution of services.

This finding, however, was inadequate and misleading. It states that appellant worked from time to time, whereas the uncontradicted testimony was that appellant worked on a full-time basis in the business for nineteen years (R. 30, 32, 56, 65). It was only during the last five of these nineteen years that appellant received the household money bearing the label "salary" (R. 39). Thus, the contribution of services by appellant was clearly substantial.

The trial court did not make any finding that the payments were support payments. It is obvious from the Memorandum Opinion that the trial court never believed that appellant had no interest in the business or that the payments were exclusively support payments. This is clearly shown by these excerpts from the opinion:

"Conceding that the obligation incurred and imposed by the agreement and decree settled and disposed of property rights as between the defendant and her former husband, it appears clear to the court from the evidence that the obligation was also 'in discharge of a legal obligation which,

because of the marital or family relationship, is imposed upon or incurred by such husband.'

"* * * The former husband it would appear was initially seeking to settle property rights and also assume and provide for other marital obligations including support and maintenance."

The trial court made findings consistent with its Memorandum Opinion. The court erred, however, in concluding from these findings that, since in its opinion the payments settled both property rights and the obligation of support and maintenance, they were taxable in full under Section 22(k) I.R.C.

Apart from its reliance on non-existent findings of fact, respondent leans heavily on the labels employed in the Separation Agreement (Plaintiff's No. 1—in Evidence) and the Decree of Divorce (Plaintiff's No. 2 in Evidence). Respondent first states that "whether payments received by a divorced wife from her former husband fall within the purview of Section 22(k) depends, of course, on their true nature, not on the labels employed to describe them" (Br. 9). After stating this correct rule of law, respondent hastily abandons it and stresses that the payments were called "support" and "alimony" in the aforementioned agreement and decree and that this appeal must be determined on the basis of these "labels" and this court must shut its eyes to the true nature of the payments.

There is, however, no reason in law or logic why the decision in this appeal should not be made on the basis of the true nature of these payments.

As we pointed out in Appellant's Opening Brief (p. 16), the appellant knew no attorney at the time of the divorce; her husband chose her attorney, and this attorney drew the agreement after one conference with appellant and her husband; her husband never brought an attorney to this conference as he was thoroughly satisfied his wife's attorney would be sufficient to protect his interests (R. 48, 49, 59-61). Appellant's undisputed testimony was that she and her husband agreed on the payments as settlement of her interest in the business (R. 43). She testified there never was any alimony (R. 45). The fact that the payments were to continue for appellant's life even though she remarried establishes that the husband was paying for property and not for support. It should be noted that appellant was only approximately forty years of age at the time of the divorce and the only child was already in the service. The possibility that appellant would soon remarry was strong. She did remarry in 1948. The evidence is conclusive appellant had a property interest in the business. The Supreme Court of Florida in the litigation between appellant and her husband found she had an interest in the business. The trial court's Memorandum Opinion and Findings of Fact show that the trial court determined appellant had a property interest in the business. Yet the Separation Agreement is couched primarily in words of "support" and "alimony." Can there be any doubt but that the husband was seeking a tax benefit to which he wasn't entitled? Should appellant be punished for her lack of knowledge regarding the

tax consequences that might result because the Separation Agreement did not spell out her property rights?

Respondent stresses that appellant filed income tax returns and paid taxes on the payments in issue, and that this shows that appellant never considered the payments as property settlement payments. The evidence revealed, however, that appellant first filed estimated tax returns on the monthly payments for the years 1945-1951 based upon the advice of her former husband's accountant (R. 50-51). In fact, this accountant prepared the first estimated return (R. 52). His fee was paid by Mr. Underwood (R. 62). The income tax returns for 1945-1951 were filed in 1952. They were prepared by an accountant who never even spoke to appellant (R. 63). Apparently his source of information must have been the Separation Agreement and Decree of Divorce here in evidence. It can be readily understood that an accountant would be overwhelmed by the language of these documents and conclude the payments were taxable. In fact, the accountant concluded that the monthly payments and the insurance premium payments were both taxable. In the trial court the respondent agreed that the accountant and the government were wrong in concluding the premium payments were taxable. We now urge that the accountant and the government were also wrong about the monthly payments. We must candidly observe that no accountant had the legal right to tell appellant whether the monthly payments were taxable or not. When the accountant gave this opinion, he

was practicing law without a license. Appellant cannot now be penalized because she accepted the accountant's advice. Certainly she made no admission by accepting erroneous advice.

It should be kept in mind that the Commissioner of Internal Revenue made his investigation after appellant filed a claim for refund and was satisfied that the payments in full were exempt from tax because they were in payment for a property interest. The Commissioner allowed the claim in full. Now respondent seeks a recovery of the refund, relying solely on the Separation Agreement and the Decree of Divorce, which documents were in the Commissioner's possession at the time the claim for refund was first allowed. Respondent does not offer any reason whatever for the change in opinion. What new evidence was uncovered to demonstrate that the original allowance was wrong? No new evidence or explanation was offered the trial court, and this phase of the case remains a mystery.

Respondent states that since the payments to the appellant were for life rather than a specified period, this negatives any idea of property settlement, and cites *Myers v. Commissioner*, 212 F. 2d 448 (C.A. 4th) and *Davidson v. Commissioner*, 219 F. 2d 147 (C.A. 9th). Actually, the cited cases hold that monthly payments for support to a wife for a fixed period, which payments terminate upon the wife's death or remarriage, do not constitute principal amounts under Sec. 22(k) I.R.C., and these cases are therefore totally irrelevant. Appellant claims exemption on the payments

in issue on the ground they paid her for property rights and are therefore not taxable under said code section at all.

RESPONDENT IS IN ERROR IN CONTENDING THAT RESPONDENT MADE A PRIMA FACIE PROOF THAT THE PAYMENTS IN ISSUE WERE FULLY TAXABLE IN THE EVENT ITS EVIDENCE SUFFICED TO ESTABLISH THE PAYMENTS WERE AT LEAST IN PART FOR SUPPORT.

Appellant submits that on the record the trial court erred in not finding the payments in issue were solely for appellant's property rights. However, the trial court concluded that the payments in issue discharged the legal obligation imposed by the marital obligation as well as appellant's property rights and concluded that the payments in their entirety were taxable. Appellant submitted in the opening brief that a single payment settling both property rights and the marital obligation of support would be partially exempt and partially taxable. Respondent concedes this statement of law (Br. 19). Appellant further submitted that respondent's burden of proof required it to prove what portion of the payment was taxable. Respondent denies this and states: "Even if this testimony could warrant a conclusion that the periodic payments were, in part, a settlement of property rights, since the burden is upon the taxpayer to overcome the prima facie case established by the Government's evidence, it would follow that the burden of proving what part would fall upon the taxpayer" (Br. 19).

This presents a key question in this appeal. Assuming respondent proved the payments in issue settled

support rights as well as property rights, does that establish a prima facie case that the payments are fully taxable and thus cast upon appellant the duty of establishing the portion which is nontaxable? Respondent offers no legal authorities to support this proposition other than to state that *Thorsness v. United States* (1948), 260 F. 2d 341 (C.A. 7th), cited by appellant, supports respondent's legal theory regarding proof of a prima facie case. In *Thorsness v. U. S.*, supra, the taxpayer had the burden of proof. He claimed certain payments discharged his obligation to support his wife, but the evidence showed the payments were for support and also to repay loans, and the appellate court said his payments were in part deductible and in part non-deductible, and that he failed to meet his burden of proof when he did not show what portion was deductible. This decision supports appellants' position and is contrary to respondent's contention. In the present case respondent is urging that appellant received taxable income. Respondent has the burden of proof. That burden of proof cannot possibly be met without proving the amount of the income.

There is no logical reason for the burden of proof to shift. The best evidence of the value of appellant's property interest in the business would be gleaned from the books and records of the business. Mr. Underwood retained the business and presumably the books and records. Thus this is not a case where the detailed facts necessary to prove an ultimate fact are peculiarly within the knowledge of one of the parties.

The claims for refund filed by appellant were allowed in full by the Commissioner of Internal Revenue and full refund with interest was made to appellant (R. 16-17). These claims were filed upon the ground that the monthly payments and insurance premium payments were part of a property settlement (R. 16). The issue made by the pleadings was whether these payments were for property or for alimony (R. 3-10). Thus, appellant's testimony that the payments were for property was no surprise to respondent. Yet the respondent chose to rely strictly on the "labels" contained within the Separation Agreement and Decree of Divorce and offered no testimony whatever on the property interest issue. The respondent could have secured the books and records as easily as could appellant. If respondent disputed the contention of appellant that she contributed services to the business, respondent should have produced witnesses. We must assume that the government's files reflected that no benefit would accrue to respondent's position by securing books and records or witnesses to produce at this trial. Respondent complains that there is no evidence upon which to determine the value of appellant's property rights. Respondent overlooks the fact that there is no evidence upon which to determine the value of the support rights either. Respondent's legal theory is that proof by respondent that any portion of the monthly payment is taxable suffices to establish the entire payment as taxable. This theory is wholly illogical, is unsupported by any authority, and must be rejected by this court.

How would respondent's theory of burden of proof have applied if the claim for refund had been denied and appellant had filed suit to recover the tax paid? Suppose appellant offered evidence that the payments in issue settled both tax-exempt property rights and also taxable support rights, and rested. Would appellant have been entitled to judgment for recovery of the tax paid unless respondent offered evidence to show the portion of the payment that settled support rights? The answer, obviously, is no. Appellant would have had to meet her burden of proof by proving the exempt portion. Here the respondent has allowed the claim for refund and seeks to recover the tax. Respondent has to meet its burden of proof just as appellant would have been required to do so if appellant had been the plaintiff. Respondent must prove the amount of taxable income received by appellant.

Respondent cites various decisions in its brief to establish that a property settlement agreement can contain support provisions (Br. 26-27). This is of course true. We do contend that the property settlement agreement in this case provided only for payments in settlement of appellant's property rights or, in the alternative, that if the property settlement agreement provided for both payment of appellant's property rights and for support, respondent failed to prove what portion was for support.

RESPONDENT HAS ERRED IN CONTENDING THAT THE STATE COURT'S ADJUDICATION IS IRRELEVANT.

As was set forth in Appellant's Opening Brief (pp. 18-22), it is state law which controls in determining the existence of property rights, and the decisions of the state courts in determining property rights is binding on the federal courts, but where state law creates legal rights and interests, the federal revenue acts designate what interests or rights so created shall be taxed. Respondent concurs with appellant, and in that regard says at page 23 of its brief:

“To the extent that a state court decision represents an adjudication of the rights of the parties under state law, the general rule is that federal law controls in the taxation of those rights.”

Certainly these principles of law must lead to the conclusion that since the decision of the Supreme Court of Florida established that appellant had an interest in the business retained by the husband, the existence of that interest is now adjudicated, but the federal law controls in determining whether or not a payment to appellant in consideration of relinquishing the interest is taxable. We submit that the legal authorities cited in Appellant's Opening Brief (pp. 22-24) establish that Section 22(k), 1939 I.R.C. does not apply to the payments made by Mr. Underwood for appellant's property rights. Respondent has in fact conceded that payments made for appellant's property rights are exempt from taxation, but contends that it was appellant's burden of proof to establish the value of these property rights (Br. 19). We differ

and urge that it was respondent's burden of proof to establish the value of the support rights.

After respondent agreed with appellant that state law controls in determining the existence of property rights, the respondent then asked this court to ignore the decision of the Supreme Court of Florida anyway and cited the following cases as authority:

Daine v. Commissioner, 168 F. 2d 449;

Van Vlaanderen v. Commissioner, 175 F. 2d 389;

Burnet v. Harmel, 287 U.S. 103;

Lyeth v. Hoey, 305 U.S. 188;

United States v. Pelzer, 312 U.S. 399;

Watson v. Commissioner, 345 U.S. 544.

In *Daine v. Commissioner*, supra, and *Van Vlaanderen v. Commissioner*, supra, the taxpayer in each case made support payments to his wife or former wife, which payments were not required by court decree or agreement incident to a decree. Subsequently each taxpayer secured a nunc pro tunc order providing for the support payments effective as of the date the payments commenced, and then claimed in the tax case that the payments were pursuant to a decree. The court in each case properly held that a retroactive judgment of a state court cannot determine the rights of the federal government in a tax purpose. These decisions are not relevant to the present appeal, as no retroactive judgment is involved. The Supreme Court of Florida interpreted the original agreement and judgment in determining that the payments to appellant were for property rights.

In *Lyeth v. Hoey*, supra, an heir received a settlement in a will contest brought by him, and the settlement was treated as an inheritance for federal income tax purposes, whether it was technically classified as an inheritance or not under state law. In *United States v. Pelzer*, supra, a gift into trust was held to be a gift of a future interest for federal gift tax purposes, even though defined as a present interest under state law. In *Watson v. Commissioner*, supra, a sale of unharvested oranges, together with the land, was held to be a sale of personal property even though the unharvested oranges would be treated as real property under state law. In *Burnet v. Harmel*, supra, a consideration paid for an oil and gas lease executed in Texas was taxed as a royalty although under Texas law the lease operated as a transfer of the oil and gas in place. In none of these decisions was there an issue as to property ownership, but rather the question was classifying the transaction for federal tax purposes. We agree with the principle of these cases that the trial court and this court have the jurisdiction to determine whether or not the payments for appellant's property rights are taxable under federal law, but no jurisdiction exists to retry the existence of the property rights.

Respondent is fully aware that it is bound by the state court adjudication relative to appellant's property interest, but for the first time in this case now urges that the Supreme Court of Florida didn't determine that appellant had a property interest and didn't determine that the payments here in issue were

payments for “property rights” and for a “property settlement”. This contention is contrary to the government’s own pleading in this case, which alleged:

“The defendant appealed the decision modifying the decree to the Supreme Court of Florida which overruled the Circuit Court and ordered the payments specifically adjudged to be payments for ‘property rights’ or to represent ‘a property settlement’ to be continued.” (Complaint, Par. 5; R. 4-5.)

The trial court found:

“17. The determination by the Supreme Court of Florida that the payments made by defendant’s former husband under the terms of the divorce decree and separation agreement were payments for her interest in her husband’s business, in whole or in part, is not binding on this Court where the United States was not a party to that litigation and where the issue in the instant case is liability for federal income taxes.”

The case was presented to the trial court on the basis that the Supreme Court of Florida had determined that the payments in issue settled appellant’s property rights in the business. The trial court agreed that this was the effect of the Supreme Court decision, but concluded, however, it was not bound by the state determination because the United States was not a party to the state litigation and because the issue before it was federal income taxes. In Appellant’s Opening Brief (pp. 18-22) appellant cited authority establishing that the fact that the government wasn’t a party to the state litigation, or the fact

that the present case involves liability for federal income taxes, in no way gave the trial court authority to ignore the adversary state proceeding which determined property rights. Respondent chooses not to challenge appellant's authorities, but instead for the first time suggests that the state court decision is irrelevant because it never did decide whether appellant had any property rights, and states:

“For this reason, the several cases relied upon by the taxpayer (Br. 18-22) for the proposition that state law controls in determining property rights and state court decisions determining such rights are binding on the federal courts have no application here, and it would serve no useful purpose to enter into a detailed review of the issues involved in those cases.” (Br. 22.)

How the Supreme Court of Florida could decide that the payments to appellant could settle her property rights and constitute a property settlement agreement without deciding that the appellant had property rights is a mystery left unsolved by respondent.

The Supreme Court of Florida had stated that “the primary and controlling question is whether the agreement constituted a property settlement or whether the financial arrangements constitute alimony.” (Appendix B—p. xvii—Appellant's Opening Brief.) The court said:

“The agreement of the parties is crystal clear. They had lived together nearly a quarter of a century and during that time had acquired some degree of wealth. The record clearly shows that at least for some time before the divorce the wife

was working in the jewelry business of her husband. The undisputed testimony is that she had done as much, or more, of the buying than he had except for diamonds. How long she had been actively participating in the business does not appear, but there can be no doubt that she had played a substantial part in helping acquire whatever wealth they possessed.” (Appendix B—pp. xvi-xvii.)

The Supreme Court concluded the agreement constituted a property settlement agreement obviously upon the ground that appellant had some property to settle and the only property was the family business to which she had contributed her services. We submit that this contention of respondent that the Supreme Court decision did not determine that appellant had property rights in the family business is completely contrary to the theory of the pleadings and the trial of the case and is wholly without substance.

CONCLUSION.

It is respectfully submitted that the judgment of the trial court should be reversed.

Dated, San Francisco, California,
September 14, 1959.

LEON SCHILLER,
CYRIL LOUIS WEEKS,
LANSBURGH, HOFFMAN & SCHILLER,
Attorneys for Appellant.

No. 16362

United States
Court of Appeals
for the Ninth Circuit

BERTHA SOLTERMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

APR 16 1959

No. 16362

United States
Court of Appeals
for the Ninth Circuit

BERTHA SOLTERMANN,

Appellant,

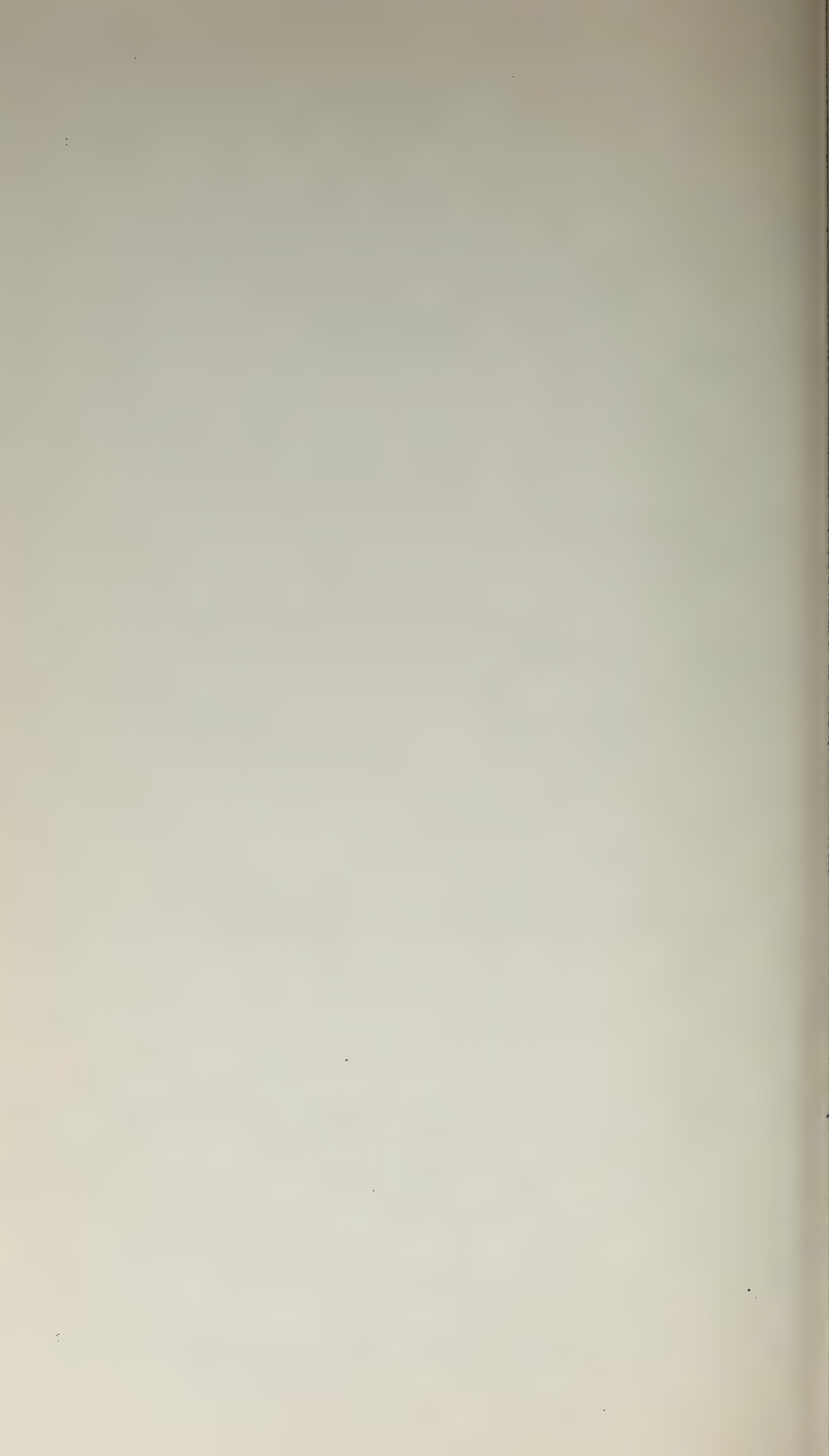
vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

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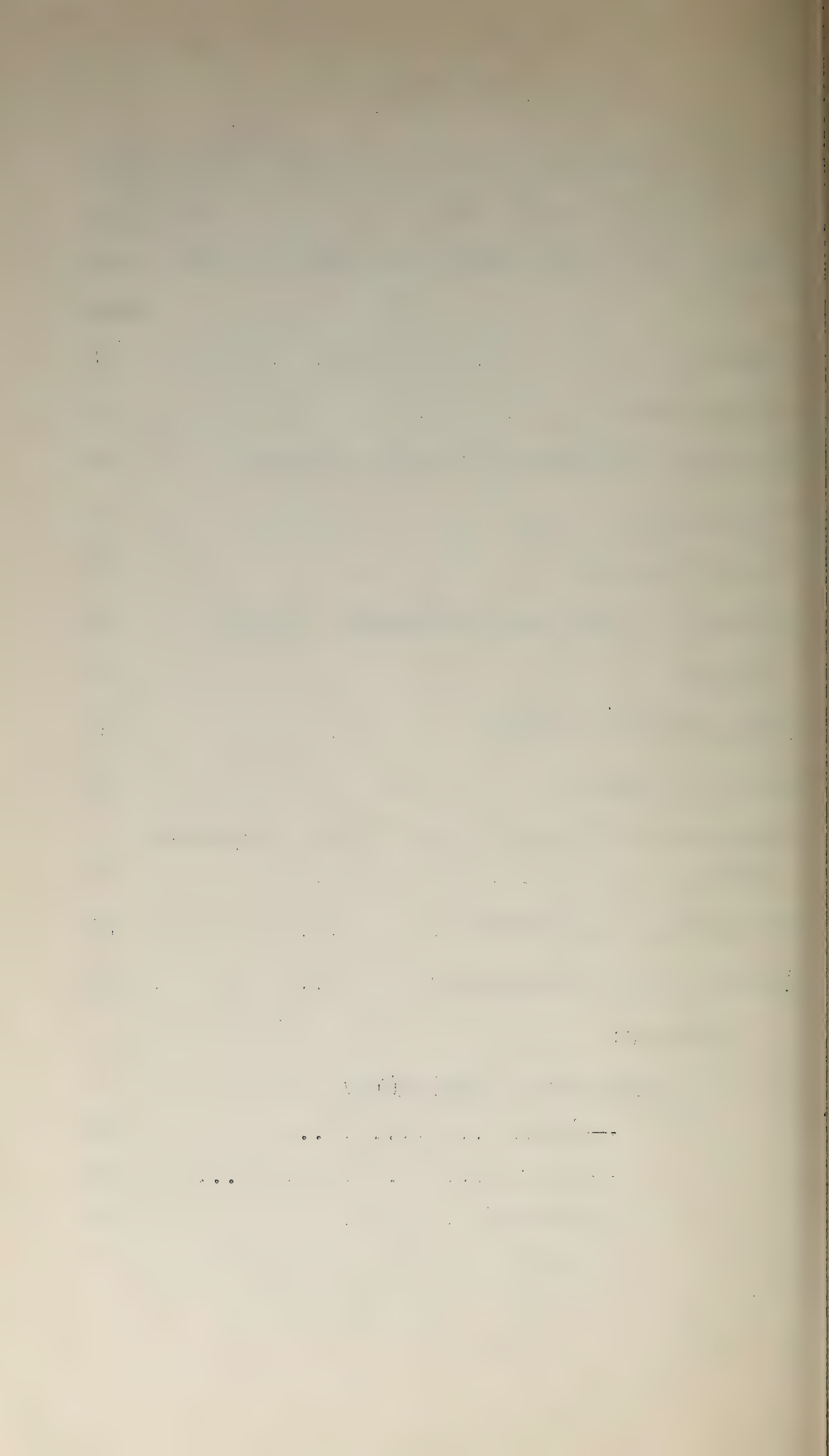
[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

LANDSBURGH, HOFFMAN & SCHILLER,
LEON SCHILLER,
CYRIL LOUIS WEEKS,

105 Montgomery St.,
San Francisco, California,

For Petitioner.

CHARLES K. RICE,
Asst. U. S. Attorney General;

LEE A. JACKSON,
Atty. Tax Division,
Department of Justice,
Tax Division,
Washington 25, D. C.,

For Respondent.



In the District Court of the United States for the
Northern District of California, Southern Division

Civil Action No. 36215

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERTHA SALTERMANN, Formerly BERTHA
M. UNDERWOOD,

Defendant.

COMPLAINT OF THE UNITED STATES FOR
ERRONEOUS REFUND OF INCOME
TAXES

The plaintiff, United States of America, by
Lloyd H. Burke, United States Attorney for the
Northern District of California, its attorney, for
its complaint herein, alleges and says:

1. This is a civil suit, sanctioned and directed
by the Attorney General of the United States and
authorized and requested by the Commissioner of
Internal Revenue of the United States, to recover
erroneous refunds of income taxes made to the de-
fendant, as hereinafter alleged.

2. Plaintiff is a corporation sovereign and body
politic.

3. Defendant Bertha Saltermann, formerly
Bertha M. Underwood, resides at 4610 Opal Cliff
Drive, in Santa Cruz, Santa Cruz County, Cal-
ifornia, within the jurisdiction of this Court.

4. The defendant formerly was the wife of Herbert Underwood from whom she was divorced by a decree entered in the Circuit Court of Duval County, Florida, on September 13, 1945, which incorporated, by reference, a separation agreement between her and her husband, executed prior to the divorce decree, by the terms of which separation agreement the defendant was to receive alimony of \$250 per month during her life, whether or not the defendant and her then husband later were divorced and whether or not the defendant thereafter remarried, the payments due the defendant being made a first charge and lien against the estate of her then husband, if he should predecease her; that as part of the separation agreement aforesaid the defendant's then husband had taken out an insurance policy on his life in the sum of \$30,000 issued to him by The New York Life Insurance Company, of which the defendant was named beneficiary, it being stipulated and agreed that she should continue to be the beneficiary of the said policy irrespective of what the marital status of the parties might be.

5. In 1952, after the defendant's remarriage, her former husband petitioned the Circuit Court of Duval County, Florida, to modify its decree, entered September 13, 1945, by releasing him from making any further payments, and the court modified the decree, releasing him from making any further payments, which it designated as "alimony," to the defendant. The defendant appealed the decision modifying the decree to the Supreme Court

of Florida which overruled the Circuit Court and ordered the payments, specifically adjudged to be payments for "property rights" or to represent "a property settlement" to be continued.

6. On July 7, 1952, the defendant filed federal income tax returns for the years 1945 to 1951, inclusive, in which she reported as taxable income alimony payments received by her from her former husband and insurance premiums paid by him on the policy of which she was named beneficiary, as she was required to do by law, and paid the income taxes due thereon, together with penalties and interest thereon provided by law.

7. On October 9, 1953, after the decision of the Supreme Court of Florida, aforesaid, the defendant filed claims for refund of the taxes paid for the years 1945 to 1951, inclusive, on the alimony payments and insurance premiums, as aforesaid, on the grounds that such payments and premiums were made to the taxpayer as part of a property settlement and were not taxable income to the defendant.

8. The claims for refund aforesaid were allowed by the Commissioner of Internal Revenue, and on or about February 25, 1955, and not earlier than that date, a check, in the sum of \$985, which included interest of \$311 for the refunds claimed for the years 1945 and 1946 was issued and delivered to the defendant or her proper representative and duly paid; that on or about March 10, 1955, and not earlier than that date, a check, in the sum of \$4,757.78, which included interest of \$866.57, for

the refunds claimed for the years 1947 to 1951, inclusive, was issued and delivered to the defendant or her proper representative and duly paid.

9. The alimony payments received by the defendant from her former husband in the years 1945 to 1951, inclusive, and the premiums paid by him on the insurance policy of which the defendant was beneficiary, during those years, were taxable income of the defendant for said years, and should not have been excluded from her taxable income; that the allowance of her claims for refund was erroneous; that there was erroneously and illegally refunded and paid to the defendant the sums of \$985 and \$4,757.78 as aforesaid, amounting to \$5,742.78, and, by reason thereof, the defendant Bertha Salt-ermann, formerly Bertha M. Underwood, is indebted to the plaintiff in the sum of \$5,742.78, together with interest thereon as provided by law, all of which is due and owing to the plaintiff, exclusive of all set-offs and just grounds of defense, and no part of which has been paid notwithstanding demand for payment made upon the defendant by the plaintiff.

Wherefore, the plaintiff asks that the Court enter judgment for the plaintiff against the defendant in the sum of \$5,742.78, with interest thereon as provided by law, and costs.

/s/ LLOYD H. BURKE,
United States Attorney, Attorney for the United
States.

[Endorsed]: Filed February 20, 1957.

[Title of District Court and Cause.]

ANSWER

First Defense.

I.

Defendant, Bertha Soltermann, sued herein as Bertha Saltermann, alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph I.

II.

Defendant denies the allegations of Paragraph IV, except that she admits that she formerly was the wife of Herbert Underwood, from whom she was divorced by a decree entered in the Circuit Court of Duval County, State of Florida, on September 13, 1945, and admits that she entered into a separation agreement with her former husband, which agreement was executed prior to the divorce decree, and alleges that by the terms of said agreement she was to receive payments of \$250.00 per month during her life as property settlement payments. Defendant further alleges that her former husband had taken out an insurance policy on his life in the sum of \$30,000.00, of which defendant was the beneficiary named in said policy, and the separation agreement provided that defendant was to continue as the beneficiary of the policy irrespective of what the marital status of the parties might be. Defendant further alleges that under the terms of the final decree, her former husband agreed to pay the premiums to keep said life insurance

policy in force, and that said premiums were paid by her former husband as property settlement payments. Defendant further alleges that in any case her interest in the life insurance policy during the years in issue was so contingent and incapable of valuation that premium payments by her former husband do not constitute income to defendant. Defendant admits that by the terms of the separation agreement the payments of \$250.00 per month during her life were to continue whether or not she and her then husband later were divorced and whether or not she thereafter remarried, and admits further that the payments due her were made a first charge and lien against the estate of her then husband if he should predecease her.

III.

Defendant denies the allegations of paragraph VI except that she admits that on July 7, 1952, she filed income tax returns for the years 1945-51, inclusive, in which she reported as taxable income the payments received by her from her former husband and the insurance premiums paid by him on the policy in which she was named beneficiary, and that she paid the amounts of income taxes reflected on said federal income tax returns together with penalties and interest thereon.

IV.

Defendant admits the allegations of Paragraph VII except that she denies that any payments received by her from her husband or any insurance

premiums paid by him on the policy in which she was named beneficiary constituted alimony.

V.

Defendant admits the allegations of paragraph VIII except that she alleges she is without knowledge or information sufficient to form a belief as to the date on which a check in the sum of \$985.00 was issued and delivered to the defendant or her proper representative and the date on which a check in the amount of \$4,757.78 was issued and delivered to the defendant or her proper representative.

VI.

Defendant denies the allegations of paragraph IX, and in particular denies that any sum was erroneously and illegally refunded and paid to the defendant, and denies that she is indebted to the plaintiff in any sum whatever.

Second Defense.

Defendant is informed and believes and therefore alleges that the refund of income taxes which plaintiff here seeks to recover was made more than two years before the commencement of this suit, and that therefore plaintiff is barred from recovering in this action any of the amounts herein sued for.

Third Defense.

The Supreme Court of the State of Florida has directly ruled on the issue as to whether the pay-

ments received by defendant from her former husband and the insurance premiums paid by him on the life insurance policy in which she was named beneficiary constituted alimony or property settlement. This was an adversary and fully contested proceeding. Said Supreme Court of the State of Florida has determined that the above payments to the defendant and the life insurance premiums paid by the former husband were property settlement payments and not alimony, and plaintiff is bound by that determination.

Wherefore, defendant prays judgment dismissing the complaint and awarding to her all of her lawful costs and disbursements.

LEON SCHILLER,
CYRIL LOUIS WEEKS,
LANSBURGH, HOFFMAN &
SCHILLER,

By /s/ LEON SCHILLER,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed August 30, 1957.

[Title of District Court and Cause.]

MEMORANDUM OPINION

The principal issue to be decided in this litigation is whether the monthly payments made to the defendant by her former husband were made in dis-

charge of a legal obligation, which because of the marital or family relationship was imposed upon or incurred by the husband under a decree or written instrument incident to the divorce proceedings between the defendant and her former husband. If so they are taxable as income to the defendant and the plaintiff must prevail.

It is defendant's position that these payments were made in recognition of the defendant's interest in a jewelry business started and developed through the joint efforts of defendant and her former husband and that the obligation was incurred in recognition of her property rights arising out of the business relationship between them.

Defendant relies heavily on the decision of the Supreme Court of Florida construing the separation agreement between her and her former husband as a property settlement agreement and holding that inasmuch as the decree of divorce was based thereon it, even though reciting that payments were for alimony, could not change the nature of the obligation.

If the sole question here was the determination of the nature of the agreement as between the parties, this court might be bound by such decision. However, the United States was neither a party to that litigation nor to the agreement and the issue here involved is the liability for taxes resulting because of the periodic payments made to defendant under that agreement. As stated by Judge Frank

in the case of *Grant vs. Comm. of I. R.*, 209 F. 2d 430, at 434: "We think that the ordinary rules, relative to private rights and duties growing out of the facts of a particular contract, must give way to the paramount aim of the revenue statute before us here."

Conceding that the obligation incurred and imposed by the agreement and decree settled and disposed of property rights as between the defendant and her former husband, it appears clear to the court from the evidence that the obligation was also "in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband."

The agreement and decrees specifically refer to the husband's obligation to maintain and support the wife. While the defendant, it appears under the evidence, did not employ her own counsel and may not have been fully advised as to her rights at the time of the divorce proceedings, she clearly understood shortly after if not at the time of making the agreement that she was going to be called upon to pay taxes on the income she was to receive and she did pay them for some time and until after the later Florida litigation. The former husband it would appear was initially seeking to settle property rights and also assume and provide for other marital obligations including support and maintenance. The latter obligation he may have desired to be crystal clear in the decree in order to insure his right to deduct payments made thereunder from his

gross income. Be that as it may, the transaction viewed as a whole indicates the agreement was entered into with a view on the part of both the defendant and former husband of discharging the husband's legal obligation imposed by the marital relationship and as such falls within the provisions of Section 22 (k) of Title 26, U.S.C.A.

As stated in *Laughlin's Estate vs. Commissioner of Internal Revenue*, 167 F. 2d 828: "It will be noted that the text of the statute makes no reference to 'alimony' as such, nor to payments for support or maintenance, but seems to encompass all payments made under a decree of divorce or separation in discharge of a legal obligation imposed under a decree of divorce because of the marital relationship." See also *Brown vs. U. S.*, 121 F. S. 106.

For the reasons stated it is the opinion of the Court that the periodic payments made to the defendant by her former husband were includable in her gross income.

Findings of fact, conclusions of law and judgment in accordance herewith and in accordance with the stipulation of counsel may be presented by mail as early as possible under the terms of the stipulation.

Dated this 23rd day of May, 1957.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]. Filed May 23, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been submitted to the Court on the stipulation of the parties hereto, testimony of the defendant Bertha Saltermann and exhibits entered in evidence on behalf of the parties thereto, the Court having fully considered the evidence as presented, the arguments of counsel both written and oral and the Court having delivered a Memorandum Opinion in favor of plaintiff on May 23, 1958, the Court does now make the following:

Findings of Fact

1. This is a civil suit, sanctioned and directed by the Attorney General of the United States and authorized and requested by the Commissioner of Internal Revenue of the United States, to recover erroneous refunds of income taxes made to the defendant, as hereinafter alleged.

2. Plaintiff is a corporation sovereign and body politic.

3. Defendant Bertha Saltermann, formerly Bertha M. Underwood, resides at 4610 Opal Cliff Drive, in Santa Cruz, Santa Cruz County, California, within the jurisdiction of this Court.

4. The defendant formerly was the wife of Herbert Underwood from whom she was divorced by a decree entered in the Circuit Court of Duval

County, Florida, on September 13, 1945, which incorporated, by reference, a separation agreement between her and her husband, executed prior to the divorce decree, by the terms of which separation agreement the defendant was to receive payments of \$250 per month during her life, whether or not the defendant and her then husband later were divorced and whether or not the defendant thereafter remarried, the payments due the defendant being made a first charge and lien against the estate of her then husband, if he should predecease her; that as part of the separation agreement aforesaid the defendant's then husband had taken out an insurance policy on his life in the sum of \$30,000 issued to him by The New York Life Insurance Company, of which the defendant was named beneficiary. The separation agreement termed the \$250 payments alimony.

5. In 1952, after the defendant's remarriage, her former husband petitioned the Circuit Court of Duval County, Florida, to modify its decree, entered September 13, 1945, by releasing him from making any further payments, and the court modified the decree, releasing him from making any further payments, which it designated as "alimony," to the defendant. The defendant appealed the decision modifying the decree to the Supreme Court of Florida which overruled the Circuit Court and ordered the payments, specifically adjudged to be payments for "property rights" or to represent "a property settlement" to be continued.

6. On July 7, 1952, the defendant filed Federal Income Tax Returns for the years 1945 to 1951, inclusive, in which she reported as taxable income payments received by her from her former husband and insurance premiums paid by him on the policy of which she was named beneficiary and paid the income taxes thereon together with interest thereon as provided by law.

7. The payments received by her from her former husband on the aforesaid income tax returns were designated as "alimony."

8. On October 9, 1953, after the decision of the Supreme Court of Florida, aforesaid, the defendant filed claims for refund of the taxes paid for the years 1945 to 1951, inclusive, on the \$250.00 payments and insurance premiums, as aforesaid, on the grounds that such payments and premiums were made to the taxpayer as part of a property settlement and were not taxable income to the defendant.

9. The claims for refund aforesaid were allowed by the Commissioner of Internal Revenue, and on or about February 25, 1955, and not earlier than that date, a check, in the sum of \$985, which included interest of \$311 for the refunds claimed for the years 1945 and 1946 was issued and delivered to the defendant or her proper representative and duly paid: that on or about March 10, 1955, and not earlier than that date, a check, in the sum of \$4,757.78, which included interest of \$866.57, for the

refunds claimed for the years 1947 to 1951, inclusive, was issued and delivered to the defendant or her proper representative and duly paid.

10. On February 5, 1957, the Bureau of Internal Revenue demanded that the aforesaid refund be returned by a letter addressed to Mr. Charles Z. Goldstein, 320 Broadway, New York, New York, who then held defendant's Power of Attorney, for the taxable years 1945 to 1951.

11. In 1945 at the time of defendant's divorce, defendant's ex-husband, Mr. Herbert F. Underwood, operated a retail jewelry store in Jacksonville, Florida, and this store was conducted by Mr. Underwood as a sole proprietor. At the time of the said divorce neither defendant nor Mr. Underwood owned any stocks, bonds, real estate or other property other than the aforesaid jewelry store.

12. The defendant at no time during her marriage to Mr. Underwood made financial contributions to the aforesaid business or any other business owned by Mr. Herbert F. Underwood from her separate property.

13. The defendant acquired no property during her marriage to Mr. Underwood by gift, bequest or device and at the time of her marriage to Mr. Underwood owned no separate property.

14. Defendant worked at the aforesaid jewelry store from time to time during her marriage with Mr. Underwood and received therefor compensation in salary which she used for joint living expenses.

15. Defendant at no time entered into any partnership agreement with Mr. Underwood during the term of the marriage with respect to any business owned or operated by him.

16. Under and pursuant to the separation agreement of September 13, 1945, incident to the divorce proceedings between the defendant and Mr. Underwood, her former husband, defendant received the following payments exclusive of payments for premiums of insurance and including all the sums paid by him pursuant to said agreement.

Year	Amount
1945	\$1,000.00
1946	3,000.00
1947	3,000.00
1948	3,000.00
1949	3,000.00
1950	3,000.00
1951	3,000.00

17. The determination by the Supreme Court of Florida that the payments made by defendant's former husband under the terms of the divorce decree and separation agreement were payments for her interest in her husband's business, in whole or in part, is not binding on this Court where the United States was not a party to that litigation and where the issue in the instant case is liability for federal income taxes.

18. By the terms of the aforementioned life insurance policy, the former husband retained the

right to change the beneficiary, to borrow on the policy, and all the other incidents of ownership in said policy. The premiums paid by the defendant's former husband on said life insurance policy are not taxable income to the defendant.

19. The policy of insurance on Mr. Herbert Underwood's life, New York Life Insurance Policy No. 20206884, was not assigned absolutely or otherwise to defendant and the defendant was not named as irrevocable beneficiary therein and in fact is not a beneficiary under the said policy and has not been since 1952.

20. That pursuant to stipulation a computation was made by the Bureau of Internal Revenue on the question of the amount of erroneous refund and the interest thereon and this computation was forwarded to the parties for their agreement. It is agreed that the total taxes due for the years 1945 through 1951 are \$2,360.14 and that the interest thereon to June 10, 1958, is \$1,186.54. The recomputation of tax is attached hereto and made a part of these findings.

Conclusions of Law

1. The Court has jurisdiction of the parties and subject matter of this case.

2. This action was brought under Section 7405 of Title 26 United States Code.

3. The premiums paid by the husband on the life insurance policy on his life are not taxable to

defendant under Section 22 (k) of the Internal Revenue Code since the life insurance policy was neither absolutely assigned to defendant nor is she the irrevocable beneficiary thereunder. I.T. 4001, C.B. 1950-1, 27.

4. The monthly payments made to the defendant by her former husband were made in discharge of a legal obligation which because of the marital or family relationship was imposed upon or incurred by the husband under a decree of written instrument incident to the divorce proceedings between the defendant and her former husband and are taxable to her under Section 22 (k) of the Internal Revenue Code of 1939.

5. Defendant is indebted to plaintiff in the amount of \$3,546.68 including \$2,360.14 principal and \$1,186.54 interest under Title 26 U.S.C., Section 6602 to and including June 10, 1958.

6. Let judgment be entered for the plaintiff in accordance herewith with costs.

Dated: September 4, 1958.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Summary of Recomputation of Tax and Interest
Bertha M. Underwood

Year	Tax	Interest
1945	\$ 216.00	\$ 150.29
1946	427.00	286.10
1947	427.00	209.05
1948	356.00	167.36
1949	356.00	152.41
1950	373.00	146.73
1951	205.14	74.60
Totals	<u>\$2,360.14</u>	<u>\$1,186.54</u>

Recomputation of Tax—Year 1945

Adjusted gross income per report of 12-28-54\$2,100.00

Add:

Alimony 1,000.00

Corrected adjusted gross income\$3,100.00

Tax on \$3,100.00—Tax Table—1 exemption\$ 538.00

Tax as previously adjusted 322.00

Deficiency (Erroneous Refund)\$ 216.00

Interest:

3-10-55 to 6-10-58 on \$216.00.....\$ 42.12

Refunded 3-10-55 108.17

Total interest\$ 150.29

Year 1946

Adjusted gross income per report 12-28-54\$ None

Add:

Alimony 3,000.00

Corrected adjusted gross income\$3,000.00

Tax on above—1 exemption\$ 427.00

Tax as previously adjusted 0.00

Deficiency (Erroneous Refund)\$ 427.00

Interest:

3-10-55 to 6-10-58 on \$427.00\$ 83.27
 Refunded 3-10-55 202.83

Total interest\$ 286.10

Year 1947

Adjusted gross income per report of 12-28-54.....\$ None

Add:

Alimony 3,000.00

Corrected adjusted gross income\$3,000.00

Tax on above—1 exemption\$ 427.00

Tax as previously adjusted 0.00

Deficiency (Erroneous Refund)\$ 427.00

Interest:

	Tax	Interest
Refunded 3-10-55\$	880.35	\$ 259.68
Correct refund	453.35	133.90

Erroneous refund\$ 427.00 \$ 125.78

3-10-55 to 6-10-58 on \$427.00\$ 83.27

Total interest\$ 209.05

Year 1948

Adjusted gross income per report dated 12-28-54\$ None

Add:

Alimony 3,000.00

Corrected adjusted gross income\$3,000.00

Tax on above—1 exemption\$ 356.00

Tax as previously adjusted 0.00

Deficiency (Erroneous refund).....\$ 356.00

Interest:

	Tax	Interest
Refunded 3-10-55	\$ 661.00	\$ 181.86
Correct refund	305.00	83.92
	<u>356.00</u>	<u>97.94</u>
Erroneous refund	\$ 356.00	\$ 97.94
3-10-55 to 6-10-58 on \$356.00		69.42
Total interest		<u>\$ 167.36</u>

Year 1949

Adjusted gross income per report of 12-28-54\$ None

Add:

Alimony	3,000.00
Corrected adjusted gross income	<u>\$3,000.00</u>
Tax on above—1 exemption	\$ 356.00
Tax as previously adjusted	0.00
Deficiency (Erroneous refund)	<u>\$ 356.00</u>

Interest:

	Tax	Interest
Refund 3-10-55	\$ 712.93	\$ 166.20
Correct refund	356.93	83.21
	<u>356.00</u>	<u>82.99</u>
Erroneous refund	\$ 356.00	\$ 82.99
3-10-55 to 6-10-58 on \$356.00		69.42
Total interest		<u>\$ 152.41</u>

Year 1950

Adjusted gross income per report of 12-28-54\$ None

Add:

Alimony	3,000.00
	<u>\$3,000.00</u>
Tax on above—1 exemption	\$ 373.00
Tax as previously adjusted	0.00
Deficiency (Erroneous refund)	<u>\$ 373.00</u>

Interest:

	Tax	Interest
Refunded 3-10-55	\$ 739.90	\$ 146.78
Correct refund	366.90	72.79
	<hr/>	<hr/>
Erroneous refund	\$ 373.00	\$ 73.99
	<hr/>	<hr/>
3-10-55 to 6-10-58 on \$373.00		72.74
		<hr/>
Total interest		\$ 146.73
		<hr/>

Year 1951

Adjusted gross income per report 12-28-54\$ None

Add:

Alimony 3,000.00

Total adjusted gross income corrected\$3,000.00

Less itemized deductions:

Contributions \$ 135.00

Medical:

Total expense\$1,259.43

Less: 5% of \$3,000.00..... 150.00 1,109.43

Miscellaneous 150.00

Total itemized deductions.... 1,394.43

Net income\$1,605.57

Less: Exemption 600.00

Taxable\$1,005.57

Tax on above 205.14

Tax as previously adjusted..... 00.00

Deficiency (Erroneous refund).. 205.14

Interest:	Tax	Interest
Refunded 3-10-55	\$ 664.35	\$ 112.05
Correct refund	459.21	77.45
	<hr/>	<hr/>
Erroneous refund	\$ 205.14	\$ 34.60
	<hr/>	
3-10-55 to 6-10-55 on \$205.14.....		40.00
		<hr/>
Total interest		\$ 74.60
		<hr/>

[Endorsed]: Filed September 4, 1958.

In the United States District Court for the North-
ern District of California, Southern Division

Civil No. 36215

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERTHA SALTERMANN, Formerly BERTHA
M. UNDERWOOD,

Defendant.

JUDGMENT

The above-entitled action came on for trial before this Court on May 15, 1958. The plaintiff the United States appeared by its attorneys and the defendant appeared in person and by her attorney and testimony having been offered and arguments, both written and oral, having been made and the Court hav-

ing filed its Findings of Fact and Conclusions of Law and Memorandum Opinion now pursuant thereto it is hereby Ordered, Adjudged and Decreed that the plaintiff have judgment against defendant in the sum of \$3,546.68 to June 10, 1958, together with interest at the rate of 6% per annum from June 10, 1958, to the date of this judgment and for its costs and disbursements in this action to be hereinafter taxed on notice and hereinafter inserted by the Clerk of this Court in the sum of \$.....

Dated: September 4, 1958.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Lodged: July 3, 1958.

[Endorsed]: Filed and entered September 4, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant, Bertha Soltermann, formerly Bertha M. Underwood, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 4th day of September, 1958.

Dated: October 31, 1958.

LEON SCHILLER,
CYRILL LOUIS WEEKS,
LANSBURGH, HOFFMAN &
SCHILLER,

By /s/ LEON SCHILLER,
Attorneys for Defendant.

[Endorsed]: Filed October 31, 1958.

In the District Court of the United States,
San Francisco, California

No. 36215

UNITED STATES OF AMERICA,
Plaintiff,
vs.

BERTHA SOLTERMANN, Formerly BERTHA
M. UNDERWOOD,
Defendant.

PROCEEDINGS

Transcript of Testimony had in the above-entitled and numbered cause, commencing at 2:30 o'clock, p.m., May 16, 1958, at San Francisco, California, before the Honorable William J. Lindberg, a United States District Judge.

APPEARANCES

R. H. FOSTER,

Assistant United States Attorney,
Post Office Building, San Francisco,
California,

Appeared for and on Behalf of the
Plaintiff.

LEON SCHILLER and

CYRIL LOUIS WEEKS,

Of Lansburgh, Hoffman and Schiller,
Eleventh Floor, 105 Montgomery Street,
San Francisco 4, California,

Appeared for and on Behalf of the
Defendant.

The Clerk: United States of America versus
Bertha Soltermann, Cause No. 36215.

Mr. Foster: Ready for the United States.

Mr. Schiller: Ready for the Defendant.

The Clerk: Will you please state your appearances, counsel?

Mr. Foster: R. H. Foster for the United States.

Mr. Schiller: Leon Schiller and Cyril L. Weeks
for Mrs. Soltermann.

The Court: Very well.

(Whereupon, colloquy was had by and between the Court and respective counsel, and the following proceeding were then had, to wit:)

The Court: How long do you think it will take to put in what evidence you have?

Mr. Foster: Probably one-half hour, I would think.

Mrs. Soltermann? [3*]

BERTHA MAY SOLTERMANN

upon being called as a witness for and on behalf of the Plaintiff, and upon being first duly sworn, testified as follows:

The Clerk: Will you state your full name and spell your last name, please?

The Witness: Bertha May Soltermann, S-o-l-t-e-r-m-a-n-n (spelling).

Direct Examination

By Mr. Foster:

Q. Mrs. Soltermann, what is your occupation at present? A. A housewife.

Q. Mrs. Soltermann, previously you were married to one Mr. Underwood, is that correct?

A. That is right.

Q. And when did that marriage take place?

A. On March 16, 1921; 1921.

Q. 1921? A. That is right.

Q. And for how long a period were you married to Mr. Underwood?

A. Until September 13, 1945.

Q. And where did you reside during that marriage?

A. Well, we lived in St. Louis, Missouri, first,

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Testimony of Bertha May Soltermann.)

and [4] then we moved to Miami Beach, Florida, and then to Miami, and then from Miami to Palatka, Florida, and then to Jacksonville, Florida, when the divorce took place.

Q. So that you lived in the State of Florida during the majority of your marital life?

A. Yes, that is right.

Q. What was your husband's occupation at that time? A. Retail jeweler.

Q. Did he have a store of his own?

A. Yes.

Q. And where was that store located?

A. The first was in Palatka, Florida, for approximately 14 years and then we opened a store in Jacksonville, Florida, for five more years.

The Court: Where was the first store?

The Witness: Palatka, P-a-l-a-t-k-a (spelling).

The Court: P-a-l-a-t-k-a (spelling)?

The Witness: P-a-l-a-t-k-a (spelling).

Q. (By Mr. Foster): Do you know how that store was held—in what form of business organization it was held?

A. I certainly do, because I worked in it for the entire time. [5]

We started this business with \$100.00 that I had saved in working and, in other words, we had been—he had been out of work and we lost most everything we had in Miami, and we came to Palatka, and finally saved up about \$100.00, and the man who had been in business in Palatka for about thirty

Testimony of Bertha May Soltermann.)

years passed on and we bought it from the widow for \$100.00, and then it just grew.

We were in a small location for a little over a year and then moved into a larger location, and each day I was there.

Q. Well, now, Mrs. Soltermann, what I am asking you right now, is, whether it was a corporation, a partnership, or sole ownership?

A. I was told by my attorney it was a sole proprietorship.

Q. I see.

A. I always thought it was a partnership.

Q. All right, now, Mrs. Soltermann, at that time had you ever executed any partnership agreements that you recall, with your husband, Mr. Underwood; sign any papers or anything of that nature?

A. Originally the store was under a corporation and I was listed as the Secretary-Treasurer, and then in 1929 when the business—during the depression the jewelry business was hurt first—we went into a [6] form of a bankruptcy, and then he took it out of the corporation, and then I always figured I was still part of it, but he apparently changed that.

Q. Well, what I am asking is: Did you ever hold any stock in any corporation in which your husband—

A. (Interposing): There was no stock.

Q. There was no stock? A. No.

Q. And to your knowledge you have never signed

Testimony of Bertha May Soltermann.)

any partnership agreements with your husband, Mr. Underwood? A. No, not to my knowledge.

Q. And to the best of your knowledge, then, during these years the business was held as a sole proprietorship by your husband, Mr. Underwood?

A. That is what I was told by my attorney.

Q. All right; now, during that period did you work in the business? A. Yes, every day.

Q. And were you paid for that work?

A. At first our business was such that neither one of us had a salary. We just took out what we needed for living and the remainder went into the business.

Q. Later, as a matter of fact, you were paid, and your payments were reflected in your withholding taxes; [7] isn't that correct? Withholding was taken out for you?

A. Yes, when we went into the Jacksonville store business there was such that I was paid a salary.

Q. And did you ever contribute any of that money to the business, money that you earned from that?

A. It went into our living and whatever was necessary—whatever, whenever money was needed.

Q. In other words, like the rest of us, you spent it? A. Well, it went on the house.

Q. All right; now, Mrs. Soltermann, you entered into a separation agreement with your husband, Herbert Underwood, prior to the divorce, did you not? A. Yes.

Testimony of Bertha May Soltermann.)

Q. I show you a document consisting of four pages, and ask you whether that is your signature, Bertha M. Underwood?

A. Yes, that is my signature.

Q. And is this the separation agreement you entered into with your then husband, Mr. Herbert Underwood?

A. I didn't read it; I was terribly upset and I was told to sign it and I did.

Q. Well, you, as a matter of fact, supplied this copy to the Government in connection with the interrogatories which you—which were served on you? [8]

A. I don't know. I think the attorney—I didn't read it.

The Court: Excuse me. Is that the original agreement?

Mr. Foster: No, this is a photostatic copy.

The Court: I mean, is that a photostatic copy of the original property settlement?

Mr. Foster: Yes, Your Honor.

Mr. Schiller: I might say we will stipulate it was signed and it may go in.

The Court: All right.

Mr. Foster: I will ask that the document consisting of four pages, entitled, "Separation Agreement," be admitted into evidence as United States Exhibit No. 1.

The Court: It may be admitted.

What is that termed? That is a separation agreement entered into just prior to the divorce action?

Testimony of Bertha May Soltermann.)

Mr. Schiller: That is right.

(Plaintiff's Exhibit No. 1 marked for identification and admitted into evidence.)

Mr. Foster: Counsel, perhaps we can get the other documents in without the necessity of questioning the witness. [9]

I will offer next the final decree of divorce between Bertha M. Soltermann and Herbert F. Underwood as United States Exhibit No. 2.

Mr. Schiller: We will stipulate to that.

The Clerk: Plaintiff's Exhibit No. 2.

The Court: All right, it may be admitted.

(Plaintiff's Exhibit No. 2 marked for identification and admitted in evidence.)

Mr. Foster: And as United States Exhibit No. 3, I would offer the amendment to the final decree of divorce.

The Court: That decree is dated in 1945, is that right?

Mr. Foster: That is correct, Your Honor.

The Court: Number 3 will be an amendment to that decree?

Mr. Foster: Yes, Your Honor, dated May 2, 1947.

Mr. Schiller: We have no objection.

The Court: Very well. It may be admitted.

(Plaintiff's Exhibit No. 3 marked for identification and admitted in evidence.)

Testimony of Bertha May Soltermann.)

Mr. Foster: I will offer then as a group Exhibits 4-A, 4-B, 4-C, 4-D, 4-E, 4-F and 4-G, [10] the tax returns for Bertha M. Underwood for the years from 1945 through the year 1951, inclusive.

Mr. Schiller: No objection.

The Court: Very well; they may be admitted.

(Plaintiff's Exhibits Nos. 4-A, 4-B, 4-C, 4-D, 4-E, 4-F and 4-G, marked for identification and admitted in evidence.)

The Court: I understand those are the tax returns?

Mr. Foster: That are involved in this litigation, yes, sir.

The Court: What do they serve to establish?

Mr. Foster: Simply establishing the tax that was paid by——

The Court (Interposing): Can't you stipulate that amount to save the trouble of the exhibits?

Mr. Schiller: The only thought that occurs to me is that if the returns go in, we will have to put in the allowances granted.

The Court: Apparently there is no question about it. I will ask you to get together and stipulate the tax paid, and so on, and save a lot of these exhibits. [11]

Mr. Foster: I will stipulate to it. I think that might be faster.

The Court: If you will go through them and give me the results, fine. I don't want to paw

Testimony of Bertha May Soltermann.)

through a lot of exhibits when you can do it yourselves.

Mr. Foster: That is what we want to do.

The Court: Your stipulation covers that.

Mr. Foster: Yes.

The Court: You just want a foundation. All right.

Mr. Foster: Yes.

The Court: All right. They may be admitted.

Mr. Foster: I might say the same thing is true with respect to the claims and the decision on those.

The Court: Yes.

Mr. Foster: I will offer them as United States exhibits next in order, the claim for refund and notice of adjustment from the Bureau of Internal Revenue, as a group exhibit, each year having a different letter.

Mr. Schiller: That would be 5.

The Clerk: 5.

Mr. Foster: 5-A, 5-B, 5-C, 5-D, 5-E and [12] 5-F.

Now, they will be in order for the years involved.

The Court: And they correspond to the——

Mr. Foster (Interposing): To the tax returns which are the United States Exhibit 4.

Mr. Schiller: Did you say A through F?

The Clerk: A through F.

Mr. Schiller: Before we had 4-A through 4-G. Wouldn't we have the same number here?

The Court: Maybe the first one should be A, B, C, D, E and F.

Testimony of Bertha May Soltermann.)

The Clerk: A, B, C, D, E, F and G in the first one.

Mr. Foster: There is one more later. I believe it is G, in the last group of exhibits. That will be 5-G.

The Court: Very well. There is no objection?

Mr. Schiller: There is no objection.

The Court: They may be admitted.

(Plaintiff's Exhibits Nos. 5-A, 5-B, 5-C, 5-D, 5-E, 5-F and 5-G marked for identification and admitted in evidence.)

Mr. Foster: I will offer then in evidence the two tax refund checks which were sent to [13] Bertha M. Underwood, Bertha Soltermann, the defendant in this action, and cashed by her some time subsequent to March 4th and March 17th, 1955.

Mr. Schiller: We have no objection.

Mr. Foster: I will offer those as a group exhibit, 6-A and 6-B.

The Court: Very well. They may be admitted, and the record shows that the defendant has abandoned the defense of the statute of limitations.

Mr. Schiller: That is correct.

(Paintiff's Exhibits Nos. 6-A and 6-B marked for identification and admitted in evidence.)

Mr. Foster: I will offer then the Government's last exhibit, the demand letter which was sent to Mrs. Soltermann, or Underwood as she then was, dated February 5, 1957, making a demand on her

Testimony of Bertha May Soltermann.)

for repayment of the refund received by her through the checks which comprise United States Exhibits No. 7, I believe.

The Clerk: Six.

The Court: Very well.

Mr. Schiller: I have no objection to the letters.

The Court: Exhibit 7 may be admitted. [14]

(Plaintiff's Exhibit No. 7 marked for identification and admitted in evidence.)

Q. (By Mr. Foster): Now, Mrs. Soltermann, the last business establishment that your then husband, Mr. Underwood, had, was in Jacksonville, Florida, is that correct? A. That is right.

Q. And to the best of your knowledge that was held as a sole proprietorship?

A. That is what I was informed.

Q. Now, during that time in what capacity did you work in the store? Did you act as a clerk?

A. I did about 80 percent of the buying of all gifts. We had quite a large bridal department, including china, silver, glass, and I purchased all of the inexpensive solid gold jewelry.

The only things we bought together would be diamond mountings or watches.

Q. All right, Mrs. Soltermann; during that year you were paid a salary?

A. No, I did that from the very beginning.

Q. I am talking about during the last year, during the years that you were in Jacksonville you received a salary for the work you did for the

Testimony of Bertha May Soltermann.)

Underwood Jewelry? [15] A. Yes.

Q. I believe in 1945 you earned some \$2100.00;
is that correct? A. I suppose that is right.

Q. All right——

The Court (Interposing): Is that 1945?

Mr. Foster: 1945.

The Witness: That would be from January until the divorce, which was in September.

Q. (By Mr. Foster, continuing): So that would extend for about six months, or half of the year?

A. A little more than that.

Q. A little more than that? A. Yes.

Q. Do you recall what your salary was?

A. \$65.00 a week.

Q. And do you recall how long it had been \$65.00 a week?

A. Well, as long as the business could afford paying it.

Q. And when did that start? It was true in 1945. Was it true in 1944?

A. Oh, yes, we were in Jacksonville for five years.

Q. So during those five years you received \$65.00 per week, or month?

A. Per week. [16]

Q. From the Underwood Jewelry Company?

A. That is right.

Q. Now, in Jacksonville, Florida, do you recall whether a business license was required?

A. A business license?

Q. Yes. A. Oh, yes.

sued by anyone? [17]

A. Not to my knowledge.

Q. And did the Underwood Jewelry Company, through either yourself or your husband, ever sue anyone else, to your knowledge?

A. Not to my knowledge.

Q. Now, you received payments from your husband, or your divorced husband or ex-husband, Mr. Underwood, beginning in the year 1945?

A. That is correct.

Q. In the year 1945 you received \$1,000.00, isn't that correct?

Testimony of Bertha May Soltermann.)

Q. Was your name on that license?

A. I think it was listed just as "Underwood Jewelers."

Q. Underwood Jewelers?

A. That is correct.

Q. Do you recall, was there a sales tax in the State of Florida?

A. There may have been—no, not to my knowledge. It had been entered later.

Q. Was the building in which that business, the Underwood Jewelers, was conducted, leased or owned?

A. It was leased but we had to put in all the improvements.

Q. And who signed by the Underwood Jewelers as lessee? A. My husband.

Q. You didn't sign it? A. No.

Q. Now, during the years that you were in Jacksonville, Florida, was there any time when you were

Testimony of Bertha May Soltermann.)

A. Well, that would have been—does that figure from September until what—the first of January?

Q. Well, that is the figure which you supplied the Government in the answer to the interrogatory.

Mr. Schiller: May I just say this, Your Honor, in the interest of time?

We furnished the amounts by years of \$250.00 a month payments.

The Court: The record may show that the answers given in the interrogatories may constitute evidence in this case.

Mr. Foster: All right.

Mr. Schiller: All right. [18]

Q. (By Mr. Foster, continuing): All right, now, did you receive any payments of alimony, or anything in the nature of alimony, during the year 1952?

Mr. Schiller: Your Honor, I will object only to the use of the language. That is what we are here for. I think “payments” should be——

Q. (By Mr. Foster, continuing): Had you received any payments during the year 1952?

A. I believe it was January and February.

Q. Did litigation then result from the failure to receive payments after February?

A. It was my former husband that took it to the civil court, to the lower court, and asked for an amendment, that he no longer owed it.

Q. You had remarried? A. Yes, sir.

Q. And when was that?

Testimony of Bertha May Soltermann.)

A. I was remarried in 1948.

Q. Now, subsequently, the Supreme Court of the State of Florida reversed the lower court's decision, isn't that correct?

A. Yes.

Q. Do you recall when that was?

Mr. Schiller: I have a photostat that we [19] ask to go in: January, 1953.

Mr. Foster: I will offer that, then, as a Government exhibit, United States Exhibit Number——

The Clerk: No. 8.

The Court: What is that—a Supreme Court decision?

Mr. Schiller: A photostatic copy of the decision of the Supreme Court of the State of Florida.

(Plaintiff's Exhibit No. 8 marked for identification and admitted in evidence.)

Q. (By Mr. Foster, continuing): Now, Mrs. Soltermann, after the rendering of the decision of the Florida Supreme Court, did you then receive payments from Mr. Underwood?

A. No. There was finally a settlement made.

Q. And when was this settlement made?

A. I couldn't tell you the exact—Mr. Schiller may have the date on that.

Mr. Schiller: I am afraid I don't have the date. However, I would suggest that the years in issue, 1949 to 1951—I don't know what [20] difference a settlement at a later date would have. I would object on the grounds of irrelevance.

The Court: I don't know what bearing it would

Testimony of Bertha May Soltermann.)

have either. You know the issues. I may have some idea about them but you know more particularly the items. It would not seem to me that the later settlement would have on this other——

Mr. Foster: No.

The Court (Continuing): ——unless it in some way would have a bearing on what the agreement was before.

Mr. Foster: Without the agreement, I don't think we can determine that, and I will withdraw the question.

Q. (By Mr Foster): Now, at the time——

The Court (Interposing): Just for the record, Exhibit 8 may be admitted.

Q. (By Mr. Foster, continuing): At the time you entered into the separation agreeemnt, which is listed as United States Exhibit No. 1—do you want to refer to it? A. Yes. [21]

Q. At the time you entered into the separation agreement, did you have any discussion with respect to your right of alimony with your husband, Mrs. Soltermann?

A. There was no alimony mentioned. That was a settlement, a property settlement for the year—for the eighteen years I put in the store.

Q. Mrs. Soltermann, I would like to have you examine United States Exhibit No. 1, and, more particularly, the second page, beginning with, “* * * as and for alimony and in full and complete satisfaction of the husband's obligation to maintain and support the wife.”

Testimony of Bertha May Soltermann.)

Do you recall that language in the document at the time you signed it in 1945?

Mr. Schiller: Your Honor, I will object, and on two grounds.

She was asked the conversation, and, secondly, the document speaks for itself.

Mr. Foster: Well, this, Your Honor, I believe, is an adverse witness under Rule 43 of the Federal Rules of Civil Procedure, and I am trying to determine what understanding there was, if any, with respect to alimony at the time of the original divorce and the witness [22] says there was none.

I think I have the right to ask such questions as will more clearly bring out the issue.

The Court: You might refresh her recollection, and that is all.

Mr. Schiller: The question was aimed at conversation and discussion and then we seemed to lose it and get in the meaning of language.

Mr. Foster: I think possibly this may be used for the purpose of impeachment as well as refreshment of recollection, in view of the fact that the witness is a party.

The Court: Well, if it is an exhibit it speaks for itself and if it is impeachment, it would not be impeachment without asking questions first.

Of course you may ask her to look at it for the purpose of refreshing recollection.

The Witness: The understanding definitely was——

Testimony of Bertha May Soltermann.)

The Court (Interposing): Just a minute. Let him ask the question.

The Witness: All right. [23]

Q. (By Mr. Foster, continuing): Do you recall the word "alimony" being mentioned at the time you signed this agreement?

A. I was so mentally upset, physically hurt, that I merely signed it to get—

The Court (Interposing): Your answer is "No"?

The Witness: I didn't read it.

Q. (By Mr. Foster): Did you sign any other agreement waiving your rights to alimony?

A. It never was alimony.

The Court: Just a minute.

Did you ever sign any other agreement—that is the question—that related to alimony?

Mr. Schiller: There, again, Your Honor, if I may—I see what you mean—any other agreement at all related to alimony as such.

A. (Continuing): No.

Mr. Foster: All right.

Q. (By Mr. Foster): Please understand me: I am not trying to upset you, but to simply find out the facts surrounding this thing.

Do you recall making any statement to your husband, or to anyone else at that time, saying [24] that "I do not want alimony"?

A. I merely said that I wanted what was rightfully mine.

The Court: I think the Court will take a brief recess.

Testimony of Bertha May Soltermann.)

Before we do, these questions, Mrs. Soltermann, merely relate to a legal construction of documents and transactions, and so we will take a short recess now, and do not become emotionally upset, and just listen to the questions and answer them as best you can.

The Witness: Thank you.

The Court: We will take a short recess now.

(Whereupon, at 3:09 o'clock, p.m., a recess was had in the within-entitled and numbered cause until 3:20 o'clock, p.m., May 16, 1958, at which time, counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: You may proceed.

Q. (By Mr. Foster): Mrs. Soltermann, during the years you were married to Mr. Underwood, did you ever receive any gifts from anyone other than your husband, or inheritances or bequests from anyone other than your husband?

A. Not during the time I was married to him, no. [25]

Q. And did you ever contribute any money to the business itself during the five years you were in Jacksonville? A. No, just hard work.

Q. And you received a salary for the work that you did do at Jacksonville, is that right?

A. In a sense.

Q. And you spent that money for the house, and——

Testimony of Bertha May Soltermann.)

A. (Interposing): That is right.

Q. (Continuing): —and house things?

A. That is right.

Q. For your own purposes?

A. That is correct.

Q. Now, I don't like to go back to this subject again but—and, please, don't be upset—do you recall any discussion with anyone at the time of this divorce concerning the subject of alimony?

A. It was never mentioned that way. It was my understanding that it was a property settlement. The business was such that the jewelry business—one always puts in everything they have, all the money, and at the time of the divorce when he said he wanted a divorce, he said, "Now, I can't pay you a lump sum, but I can pay you \$250.00 a month, and [26] then at the time of my death you would have the protection of this life insurance."

Q. All right; when did he make this statement to you?

A. I had gone to the markets—I went to the markets two or three times a year, New York and Chicago, and he suggested, "Well, as long as you are going to Chicago, why not visit your aunt in Victoria?"

I was away about one month and when I returned he said, "I want a divorce," and he said, "I have figured this out."

Q. That was in 1945? A. That is correct.

Q. And that was prior to executing the agreement which is United States Exhibit No. 1?

Testimony of Bertha May Soltermann.)

A. Yes.

Q. At that time you didn't have any partnership interest or anything else in the business, isn't that right?

A. Well, I always thought I did but my lawyers informed me I didn't.

Q. Did you have a conference with your lawyers and him together?

A. We were together when he said he wanted a divorce. I said, "Well, I didn't know a lawyer," and he said, "Well, I have a friend," which we did, and we went there together, and he repeated the same thing, that [27] he would pay \$250.00 a month as a settlement, plus the insurance.

Q. At the time this agreement was executed, did you have his attorney as your own?

A. No; just the one I am speaking of.

Q. And who was that? A. Fred Noble.

Q. And who is Paul E. Speak or Speech?

A. I think that was the lawyer that represented him.

The Court: What was the name?

Mr. Foster: I believe it is Speech, S-p-e-e-c-h (spelling).

The Court: S-p-e-e-c-h (spelling).

The Witness: I didn't know him at all.

Q. (By Mr. Foster): But he was the attorney for Mr. Underwood?

A. That is right; at the time of the divorce.

Q. And you were represented by Mr. Noble?

A. That is right.

(Testimony of Bertha May Soltermann.)

The Court: Mr. Noble is a lawyer also?

The Witness: That is right, of Jacksonville.

The Court: He was selected by your husband?

The Witness: That is right.

Q. (By Mr. Foster): All right; did you have a conference with the [28] attorneys and with your husband at that time?

A. Just the conversation that I have repeated, and he said, "Well, I will get this separation agreement," which was—and the divorce was all gotten within a week.

Q. Now, did your attorney, Mr. Noble, advise you that you had a right to the payment of alimony?

A. Alimony wasn't mentioned then. It was just a property settlement.

Q. Well, now, as I say, I am sorry for going into this and I realize it has been a long time ago, and the reason I am asking you these questions is to refresh your recollection about it. A. Yes.

Q. Prior to the time when you had this conference with your husband and the other lawyer who represented your husband, and your lawyer, you had a conversation with your own lawyer, Mr. Noble, didn't you?

A. Never when my former husband wasn't there.

Q. Now, did your attorney ever advise you—please try to recall—that under Florida law you had a right to alimony?

A. I don't remember.

(Testimony of Bertha May Soltermann.)

Q. Now, did you own a car at that time?

A. My husband did. [29]

Q. And that car was in his name?

A. I didn't drive at that time.

Q. The home which you lived in——

A. (Interposing): It was just an apartment, and that \$65.00, I paid the rent on for that.

Q. But you owned no real estate? A. No.

Q. And, Mrs. Soltermann, you owned no real estate or stocks and bonds or anything else in your own name, is that correct?

A. Not at that time.

Q. Do you know whether or not your husband had any stocks and bonds?

A. No; every penny went into the store.

Q. Was—you have a son, do you not?

A. Yes.

The Court: Do you have what?

Mr. Foster: A son.

Q. (By Mr. Foster): The son stayed with you, is that correct?

A. At the time of the divorce my son was in the Navy.

Q. I see. He was grown by that time?

A. Yes.

Q. Now, Mrs. Soltermann, you actually filed estimated tax returns during the years 1945 through 1951, [30] isn't that correct? A. Yes, yes.

Q. Although you didn't file the return itself?

A. No.

(Testimony of Bertha May Soltermann.)

Q. You filed the return itself in something like 1952?

A. The reason, if I may explain how this happened, the auditors my husband had for the store, in March, 1946, sent me a return for the amount that I was to pay.

Q. Mrs. Soltermann, perhaps you had better wait until your attorney asks you about that because that isn't what I was going into right now, and I would like to have my own question answered.

A. Yes.

The Court: The question is, you filed the estimates and paid the tax, but not a return?

The Witness: I suppose I did; perhaps not the way it should have been.

Q. (By Mr. Foster): I am not suggesting there was anything wrong in that, but what I am getting at is this:

You actually paid the Internal Revenue Bureau money with each estimated tax return you filed?

A. Yes.

Q. Now, that, the money that you paid, was on the money [31] that you received in the periodic payments from your husband, ex-husband, Mr. Underwood; isn't that correct?

A. That is right.

Q. Now, did you identify at that time the source of the funds on which you were paying the tax?

Mr. Schiller: Just for the purpose of clarification, counsel, are you referring to the estimates?

Mr. Foster: To the estimates, yes.

The Court: Well, it is almost common knowl-

(Testimony of Bertha May Soltermann.)

edge that you wouldn't give a source of income in filing estimates.

Mr. Foster: I guess that is right.

Q. (By Mr. Foster, continuing): Well, then, in 1952 when you executed your actual tax returns, you——

(Whereupon, there was a brief pause.)

Mr. Foster: Withdraw that question.

Q. (By Mr. Foster, continuing): In 1952 when you filed your returns, you did list the source of your income; isn't that correct? A. Yes.

Q. Now, I will show you United States Exhibit No. 4-A. [32]

You listed the source of your income for 1945 as alimony; isn't that correct?

Mr. Schiller: There again, your Honor, I will object on the grounds that the returns speak for themselves. We admit that they were signed and are the witness' returns.

The Court: I assume that is correct, and the exhibit would so show, and speaks for itself.

Mr. Foster: What I am trying to develop is her understanding of what she received. She says it was a property settlement agreement.

The Court: Why don't you ask if she read them?

Q. (By Mr. Foster, continuing): Did you read the tax returns before you filed them?

The Court: Signed them.

Q. (By Mr. Foster, continuing): Signed them?

A. Yes; for the simple reason I was advised by

(Testimony of Bertha May Soltermann.)

people that I thought knew and who advised me to sign them that way. I certainly didn't know.

Mr. Foster: I have no further questions.

Mr. Schiller: Your Honor, I would like to [33] suggest this:

If the Government is shortly to close, rather than questioning Mr. Soltermann on cross-examination, I can just question her as our defense case. I would rather do that than cross-examine.

Mr. Foster: That will conclude the Government's evidence, your Honor.

The Court: All right.

What is your evidence going to consist of?

Mr. Schiller: Our evidence will consist, first of all, of putting two documents into evidence, and I want to go into some of the matters developed here as to the nature of her service and what she got the \$65.00 for.

The Court: That can be both direct and cross-examination.

Mr. Schiller: I am putting on my case now. I am opening the defense.

The Court: All right.

Mr. Foster: I have no objection to the two documents counsel refers to.

The Court: We might admit them now, if you will just describe them.

Mr. Schiller: The first is the New York [34] Life Insurance Company policy on the life of Herbert F. Underwood.

(Testimony of Bertha May Soltermann.)

Despite the Government's concession, we feel it is better to have it in the record.

The Clerk: Defendant's Exhibit A.

The Court: It may be admitted.

(Defendant's Exhibit A marked for identification and admitted in evidence.)

Mr. Schiller: And we then want to offer in evidence the letter from the United States Treasury Department dated January 31, 1955, addressed to Mrs. Bertha M. Underwood, which has attached to it a copy of the various reports from 1945 to 1951, showing the allowance of a claim for refund.

Actually, I think this fits in with the group mentioned before, and it will help counsel and myself to make the computation.

The Court: It may be admitted.

The Clerk: Defendant's Exhibit B.

(Defendant's Exhibit B marked for identification and admitted in evidence.) [35]

Cross-Examination

By Mr. Schiller:

Q. Mrs. Soltermann, you were asked questions with regard to the payment of a \$65.00 a week salary? A. Yes.

Q. Will you tell the Court precisely what you used the \$65.00 a week for?

A. Well, it went into a joint account in which I said the rent for the apartment and food.

(Testimony of Bertha May Soltermann.)

Q. It was used for family expenses?

A. It was used for family expenses.

Q. Now, when were you and Mr. Soltermann married? A. On March 16, 1921.

Mr. Weeks: You said "Mr. Soltermann."

Q. (By Mr. Schiller): Underwood?

A. March 16, 1921.

Q. How old were you both at the time?

A. I was 17 and he was 19.

Q. Was he a man of property at the time? Did he have any assets? A. Not a dime.

Q. What business was he then in?

A. He was learning to be a watchmaker and then from there he went into the selling of [36] jewelry.

Q. Where were you living at that time?

A. In St. Louis, Missouri.

Q. And how long did you stay in Missouri?

A. A little over five years.

Mr. Foster: I hesitate to intervene with counsel's presentation, but I believe most of these questions were already brought out on my examination of the witness and I believe that the questions being asked and answered are merely cumulative material at this time.

The Court: Well, there are a few additional facts.

Mr. Schiller: Thank you.

Q. (By Mr. Schiller): Now, what business did your husband—after you moved from Missouri, what city did you move to?

(Testimony of Bertha May Soltermann.)

A. To Miami Beach, and he sold real estate and then the boom fell through and we lost everything we had. We left Palatka and I had a diamond ring which was worth about \$1,200.00, and about \$650.00 in cash.

Q. I see; now, as I understood your testimony on direct examination, a business was purchased for \$100.00 down? A. That is correct.

Q. And that is the first time that you went into the [37] jewelry business?

A. Into the retail business, that is right.

Q. And what was the source of that \$100.00?

A. That was a down payment on this jewelry business.

Q. Where did the money come from?

A. It is what I had saved out of housekeeping.

Q. And when did you go to work in the store the first time?

A. Immediately when we opened the store.

Q. And at the time that the store was opened, how many employees did you hire?

A. Just the two of us at the time it was opened.

Q. And would you tell the Court what the nature of your services were from the time that you first went into the store until the time of the divorce—what was the nature of the services you rendered?

A. Well, I did all the buying of practically all of the—

The Court (Interposing): You have already covered that.

(Testimony of Bertha May Soltermann.)

The Witness: I have given all that.

The Court: Is there anything else you did that you have not told us?

The Witness: Well, I trimmed all the windows and all the cases. I did that in both [38] stores. We owned both stores at one time in Palatka and Jacksonville.

The Court: You were operating two stores?

The Witness: Yes, and I did all the decorating.

Mr. Schiller: I am handicapped by my failure to lead her.

The Witness: In fact, I had a big write-up in a very big magazine—a national publication.

Mr. Foster: I have no objection to counsel's leading the witness.

Mr. Schiller: All right.

Q. (By Mr. Schiller): Now, during the time that you were operating this business, you and your husband acquired no investments then whatever outside the business? A. No.

Q. All the profits were retained in the business?

A. That is right.

Q. Now, with regard to the discussion with your husband on the subject of the settlement between the two of you, where did this conversation take place?

I understood you and your husband were alone—just the two of you?

A. It was in our home in the apartment. [39]

Q. Had he ever said anything to you prior to that day about a divorce?

(Testimony of Bertha May Soltermann.)

A. Not in direct terms like that, no.

Mr. Schiller: I don't think I will go over that testimony. It was rather clear.

Q. (By Mr. Schiller): Now, the next meeting—at that particular meeting, I want to get it clear, in regard to counsel, what did you say to your husband, and what did he say to you with regard to your representation by counsel?

A. Well, when he said he wanted a divorce, I said, "Well, what do we do now? I don't know of a lawyer."

Mr. Foster: I think this matter was already gone into. I think probably the evidence is not admissible, in any event, since it is a marital communication.

The Court: You mean privilege of some kind?

Mr. Foster: I think it is privilege.

The Court: I don't think there is any claim of privilege here.

Mr. Schiller: It is something that has been gone into a little bit.

The Court: Yes. If there is anything about that conversation she has not told us, [40] all right.

Do you know of anything?

Mr. Schiller: Well, quite frankly, I am not sure that her testimony was clear to me.

Q. (By Mr. Schiller): Let me simply ask you this: Did your husband then recommend a lawyer to you? A. Yes; he did.

Q. And——

(Testimony of Bertha May Soltermann.)

A. (Interposing): And we went together; we went to that lawyer together.

Q. Now, at the meeting at this lawyer's office, was—the man that was characterized as your husband's lawyer, was he present at this meeting?

A. No; he was not.

Q. The only people present were you and your husband? A. That is correct.

Q. And your lawyer? A. That is correct.

The Court: That was Mr. Noble?

The Witness: That is right, sir.

Q. (By Mr. Schiller): And did I understand your testimony now that your husband made the same offer in the lawyer's office that he made at home? [41] A. The same agreement, yes.

Q. And that was to the effect that he would pay you for your interest in the business?

A. \$250.00 for the rest of my life, plus the insurance policy.

Q. Were there any——

Mr. Foster (Interposing): Counsel, I am going to object to your questions as assuming something not in evidence. She didn't state that that was the reason for the payment on examination by me.

Mr. Schiller: That is why I am having a little difficulty questioning her. As I recall, her testimony was that there was some difficulty in the jewelry business about paying a lot of money, so she said he would pay her for the interest.

The Witness: That is correct—all the money——

(Testimony of Bertha May Soltermann.)

The Court (Interposing): Just a minute. Wait until this car gets by.

(Whereupon, there was a brief pause, during which time traffic noises outside the court room were heard.)

The Court: Will you just tell us what that [42] conversation was in your own words, all of it that you can remember?

The Witness: Well, at the time at home in the apartment he said, "Now, I want a divorce." Then he said, "I will—I have—I will agree to pay you \$250.00 a month for the rest of your life, plus the insurance of \$30,000.00 if I should die. This will be in payment of your services, in your property settlement, as you know"—and I knew very well—that there was very little cash money.

All moneys were always invested rightaway, right back into jewelry, because we wouldn't make money on cash but on jewelry we would have, so that there was no cash.

The Court: Well, go ahead with the conversation.

The Witness: So that is the reason he arranged it that way. He said he could pay \$250.00 without jeopardizing the business as well as keep the premium payments up on the insurance.

The Court: That was all the conversation, as best you recall?

The Witness: That is right.

The Court: Now, was there any further [43]

(Testimony of Bertha May Soltermann.)

conversation when you had Mr. Noble—this conversation you have given us is the one you and your husband had?

The Witness: That is right.

The Court: Now, let's have the conversation, if there was anything in addition, or let us have the whole conversation had between or among you and your husband and Mr. Noble.

The Witness: Well, when I was present there would be Mr. Noble and my former husband and myself and that is all that was there, and he repeated the same thing again, which is as I have repeated it.

The Court: And did the lawyer say anything further, as best you recall?

The Witness: No; not to my knowledge, no.

The Court: I am sorry.

Mr. Schiller: I appreciate that, your Honor.

Q. (By Mr. Schiller, continuing): After that meeting, as I understand it, you never had any meeting with your lawyer at all? A. No.

Q. How soon after that meeting was the actual divorce?

How long after that was it you saw the document which is Plaintiff's Exhibit No. 1, which is the [44] separation agreement?

A. Well, to the best of my knowledge we went to the lawyer's office on a Monday morning. Tuesday he called us and said the separation agreement was ready, and Thursday the divorce was granted.

Q. Now, with regard to the filing of the esti-

(Testimony of Bertha May Soltermann.)

mated tax returns, were you advised by anyone to file those returns?

A. Well, the auditor that made up our books at the store had listed my services in the store from, like January until September, until the divorce, and this was a copy of a form. I really don't remember——

Q. (Interposing): Yes?

A. (Continuing): ——but in that he stated I would have to pay—that I would pay income tax on that amount, and then I went to——

The Court (Interposing): “On that amount.” What amount?

The Witness: \$250.00.

Q. (By Mr. Schiller): \$250.00 per month?

A. Yes; and then I moved to Toronto, and the American consulate there, I took it to him and asked him just what I should do, and he said just continue making it out the way you have, and send it to [45] Baltimore, which I did.

Q. Now, who paid the fee of the accountant?

A. My husband.

Q. Did you ever pay him any money?

A. No.

Q. Did you ever retain him personally?

A. No.

Q. In connection with the filing of the income tax returns that were filed in 1952, did you rely on any accountant's advice in that case?

A. I got in touch with my lawyer in New York, Rosenbloom, that had handled the Florida Supreme

(Testimony of Bertha May Soltermann.)

Court decision, and my husband had his auditor, who was Mr. Goldstein, in New York, and it was he that worked it all out as to how much I would have to pay and he gave me the figures. That was on the premiums of the insurance.

Q. Did you have any conversation with Mr. Goldstein about the returns?

A. Not personally.

Q. Did you have any conversation about this with Mr. Rosenbloom?

A. Yes; I talked to Mr. Rosenbloom. On the return?

Q. Yes.

The Court: Mr. Rosenbloom was your New [46] York counsel?

The Witness: Yes; my New York attorney.

Q. (By Mr. Schiller, continuing): Did he make any recommendations with regard to filing the 1952 returns—pardon me—filing the returns in 1952?

A. He got in touch with Mr. Goldstein and said he was an attorney and not a tax auditor, and Mr. Goldstein then worked it out from there.

Q. And do you know what information or documents or advice was given Mr. Goldstein prior to his preparing these returns?

A. No; I do not.

Q. You never had any conversation with him?

A. No.

Mr. Schiller: Excuse me one second, your Honor.

(Testimony of Bertha May Soltermann.)

(Whereupon, there was a brief pause.)

Mr. Schiller: I don't think we have any further questions.

Mr. Foster: Just one or two.

The Court: Is that your case?

Mr. Schiller: That is our case.

The Court: Redirect examination? [47]

Redirect Examination

By Mr. Foster:

Q. Mrs. Soltermann, you were speaking about \$100.00 that was used to start your husband's first business? A. That is correct.

Q. Had you worked anywhere for wages prior to that time? A. Before I was married.

Q. But since the time you married Mr. Underwood, you had not worked anywhere else except the hard work of a housewife? A. That is right.

Q. The \$100.00 was then taken from your and your husband's joint account?

A. Well, it was a savings account.

Q. And that savings account was taken from money secured from his earnings, is that correct?

A. Well, it was—it was. He was at that time working in Jacksonville for a store as a salesman, and he would send money home for living expenses, and I saved the money out of that.

Q. What I am trying to find out is whether it was the money he earned from his own work?

(Testimony of Bertha May Soltermann.)

A. Well, I wasn't working. I had two small children.

Q. I understand very well.

All right, now, this Mr. Noble, was he a [48] member of the bar of the State of Florida?

A. Yes.

Q. And in Jacksonville? A. Yes.

Q. He is a reputable attorney, so far as you knew? A. Well, I hope so. I thought so.

Mr. Foster: I have no further questions.

Mr. Schiller: Just one question.

Recross-Examination

By Mr. Schiller:

Q. In connection with the two children, who cared for the children while you were working in the business?

A. I had a colored maid that worked for me for fifteen years and I would arrange the meals and tell her what to fix, and she would carry on from there.

Q. Your services in the business then were on a full-time basis?

A. Full-time basis, that is right.

Mr. Schiller: That is all.

Mr. Foster: That is all.

The Court: That is all, then.

The Witness: Thank you.

(Witness excused.)

(Whereupon, arguments were made by counsel and proceedings continued.) [49]

Reporter's Certificate

I, Earl V. Halvorson, Official Court Reporter for the United States District Court, Eastern and Western Districts of Washington, do hereby certify that the foregoing is a full, true and complete transcript of the testimony hereinbefore set forth, had on the date hereinbefore set forth, and I do further certify that the foregoing transcript has been prepared by me or under my direction; and I do further certify that the proceedings had as set forth in the foregoing transcript were reported by me by assignment with the Honorable William J. Lindberg presiding in San Francisco, California.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed January 9, 1959. [50]

[Title of District Court and Cause.]

DOCKET ENTRIES

1957

Feb. 20—Filed complaint and issued summons.

* * *

Aug. 30—Filed answer of defendant.

Aug. 30—Filed substitution of Leon Schiller, Cyril Louis Week & Landsburgh, Hoffman & Schiller as counsel for defendant.

1957

Oct. 2—Filed interrogatories by plaintiff to defendant.

Nov. 20—Filed answer of defendant to interrogs. by plaintiff.

* * *

1958

Apr. 14—Ordered case for trial May 15, 1958 (Goodman).

May 15—Ordered case assigned to Judge Lindberg for trial May 16, 1958, at 2:00 p.m. (Harris).

May 16—Filed stipulation of facts.

* * *

May 16—Court trial. Opening statements made, evidence and exhibits introduced, defendant to file memo. by May 21, 1958; plaintiff to answer in 24 hours if necessary and case continued to May 23, 1958, at 9:30 a.m. for final decision (Lindberg).

* * *

May 23—Further court trial. Arguments heard and judgment ordered for plaintiff. Counsel to prepare findings, conclusions and judgment and forward to Court at Seattle (Lindberg).

May 23—Filed memo opinion (payments to defendant should be included in tax returns) (Lindberg).

May 26—Mailed copies of opinion to counsel.

* * *

1958

Sept. 4—Filed findings and conclusions (Lindberg).

Sept. 4—Entered judgment—filed Sept. 4, 1958—
for plaintiff v. deft. in sum \$3,546.68 with
6% interest from June 10, 1958, to date
of this judgment and costs (Lindberg).

Sept. 4—Mailed notices.

Oct. 31—Filed notice of appeal by defendants.

Nov. 3—Mailed notices.

Nov. 12—Filed bond on appeal (\$250.00).

Dec. 3—Filed order extending time to docket appeal to Jan. 29, 1959 (Lindberg).

1959

Jan. 9—Filed appellant's designation of record on appeal.

Jan. 9—Filed reporter's transcript of proceedings
May 16, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Answer.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Order Extending Time to Docket Record on Appeal.

Designation of Record on Appeal.

Reporter's transcript of proceedings.

Plaintiff's Exhibits 1, 2, 3, 4-a, 4-b, 4-c, 4-d, 4-e, 4-g, 4-f, 5-a, 5-b, 5-c, 5-d, 5-e, 5-f, 5-g, 6-a, 6-b, 7, and 8.

Defendant's Exhibits A and B.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 28th day of January, 1959.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy.

[Endorsed]: No. 16362. United States Court of Appeals for the Ninth Circuit. Bertha Soltermann, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: January 28, 1959.

Docketed: February 13, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16362

BERTHA SOLTERMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES, AND DESIGNA-
TION OF PARTS OF RECORD TO BE
PRINTED

The points upon which appellant intends to rely in this appeal are as follows:

1. The Court erred in granting judgment for plaintiff, respondent herein.

2. The Court erred in making findings of fact which are not supported by the evidence and which are in fact contrary to all the evidence.

3. The Court erred in failing to make findings of fact essential to a correct determination of the cause.

4. The Court made erroneous conclusions of law.

5. The Memorandum Opinion does not correctly state the facts of the case and does not correctly state the applicable law.

6. The Court erred in its judgment rendered in the cause.

7. The Court erred in determining that the decision of the Supreme Court of Florida, holding that the payments here in issue were in consideration of the property rights or property interests of defendant (appellant herein), was not binding on it.

8. The Court erred in excluding evidence both oral and documentary.

9. The Court erred in admitting evidence both oral and documentary.

Dated: February 5, 1959.

LEON SCHILLER,
CYRIL LOUIS WEEKS,
LANSBURGH, HOFFMAN &
SCHILLER,

By /s/ LEON SCHILLER,
Attorneys for Appellant.

Certificate of Service by Mail attached.

[Endorsed]: Filed February 6, 1959.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated that the exhibits designated on appeal in this action may be considered in their original form without printing, and without prejudice to either party to print any exhibits as an appendix to the briefs to be filed.

Dated: February 4, 1959.

LEON SCHILLER,
CYRIL LOUIS WEEKS,
LANSBURGH, HOFFMAN &
SCHILLER,

By /s/ LEON SCHILLER,
Attorneys for Appellant.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for Respondent.

[Endorsed]: Filed March 14, 1959.



